

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY J. WILLARD, individually and as;
Trustee of the Larry James Willard Trust Fund;
and OVERLAND DEVELOPMENT
CORPORATION, a California corporation,

Electronically Filed
NO. 77780
Aug 26 2019 04:44 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Appellants,

vs.

BERRY-HINCKLEY INDUSTRIES, a
Nevada corporation; and JERRY HERBST,
an individual,

Respondents.

APPENDIX TO APPELLANTS' OPENING BRIEFS

VOLUME 17 OF 19

Submitted for all appellants by:

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ATTORNEYS FOR APPELLANTS
LARRY J. WILLARD, et al.

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| | Exhibit 10: Letter dated March 12, 2013 from L. Steven Goldblatt, Esq. to Jerry Herbst re breach of the Virginia Lease | | 9 | 1870-1874 |
| | Exhibit 11: Letter dated March 18, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property Lease | | 9 | 1875-1877 |
| | Exhibit 12: Letter dated April 12, 2013 from Gerald M. Gordon, Esq. to L. Steven Goldblatt, Esq. re breach of the Virginia Property lease | | 9 | 1878-1880 |
| | Exhibit 13: <i>Operation and Management Agreement</i> dated May 1, 2013 between BHI and the Willard Plaintiffs re the Virginia Property | | 9 | 1881-1885 |
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| | Exhibit 19: <i>Motion by the National Credit Union Administration Board, Acting in its Capacity as Liquidating Agent for Telesis Community Credit Union, for Order Terminating Automatic Stay or, Alternatively, Requiring Adequate Protection</i> and related declarations and declarations and exhibits thereto filed July 18, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN | | 9 | 1921-1938 |
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| | Exhibit 27: Bill Detail from the Washoe County Treasurer website re 2012 property taxes on the Virginia Property | | 9 | 2007-2008 |
| | Exhibit 28: Bill Detail from the Washoe County Treasurer website re 2013 property taxes on the Virginia Property | | 9 | 2009-2010 |
| | Exhibit 29: <i>Order of Case Dismissal</i> filed September 30, 2013 in case <i>In re Larry James Willard</i> , Northern District of California Bankruptcy Case No. 13-53293 CN | | 9 | 2011-2016 |
| | Exhibit 30: Invoice from Santiago Landscape & Maintenance dated October 24, 2013 | | 9 | 2017-2018 |

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| (cont 30) | Exhibit 31: Appraisal of the Virginia Property by David A. Stefan dated February 10, 2014 | | 9 | 2019-2089 |
| | Exhibit 32: <i>Seller's Final Closing Statement</i> dated March 6, 2014 re short sale of the Virginia Property from the Willard Plaintiffs to Longley Partners, LLC | | 9 | 2090-2091 |
| | Exhibit 33: Invoices from NV Energy for the Virginia Property | | 9 | 2092-2109 |
| | Exhibit 34: Invoices and related insurance policy documents from Berkshire Hathaway Insurance Company re the Virginia Property | | 9 | 2110-2115 |
| | Exhibit 35: Notice of Violation from the City of Reno re the Virginia Property and correspondence related thereto | | 10 | 2116-2152 |
| | Exhibit 36: Willard Plaintiffs Computation of Damages spreadsheet | | 10 | 2153-2159 |
| | Exhibit 37: E-mail message from Richard Miller to Dan Gluhaich dated August 6, 2013 re Virginia Property Car Wash | | 10 | 2160-2162 |
| | Exhibit 38: E-mail from Rob Cashell to Dan Gluhaich dated February 28, 2014 with attached <i>Proposed and Contract</i> from L.A. Perks dated February 11, 2014 re repairing the Virginia Property | | 10 | 2163-2167 |
| | Exhibit 39: <i>Deed</i> by and between Longley Center Partnership and Longley Center Partners, LLC dated January 1, 2004 regarding the Virginia Property, recorded April 1, 2004 in the Washoe County Recorder's Office as Doc. No. 3016371 | | 10 | 2168-2181 |

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| (cont 30) | Exhibit 40: <i>Grant, Bargain and Sale Deed</i> by and between Longley Center Partners, LLC and P.A. Morabito & Co., Limited dated October 4, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291753 | | 10 | 2182-2187 |
| | Exhibit 41: <i>Grant, Bargain and Sale Deed</i> by and between P.A. Morabito & Co., Limited and Land Venture Partners, LLC dated September 30, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291760 | | 10 | 2188-2193 |
| | Exhibit 42: <i>Memorandum of Lease</i> dated September 30, 2005 by Berry-Hinckley Industries regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc. No. 3291761 | | 10 | 2194-2198 |
| | Exhibit 43: <i>Subordination, Non-Disturbance and Attornment Agreement and Estoppel Certificate</i> by and between Land Venture Partners, LLC, Berry-Hinckley Industries, and M&I Marshall & Isley Bank dated October 3, 2005 regarding the Virginia Property, recorded October 13, 2005 in the Washoe County Recorder's Office as Doc No. 3291766 | | 10 | 2199-2209 |
| | Exhibit 44: <i>Memorandum of Lease with Options to Extend</i> dated December 1, 2005 by Winner's Gaming, Inc. regarding the Virginia Property, recorded December 14, 2005 in the Washoe County Recorder's Office as Doc. No. 3323645 | | 10 | 2210-2213 |

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| (cont 30) | Exhibit 45: <i>Lease Termination Agreement</i> dated January 25, 2006 by Land Venture Partners, LLC and Berry-Hinckley Industries regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353288 | | 10 | 2214-2218 |
| | Exhibit 46: <i>Grant, Bargain and Sale Deed</i> by and between Land Venture Partners, LLC and P.A. Morabito & Co., Limited dated February 23, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353289 | | 10 | 2219-2224 |
| | Exhibit 47: <i>Grant, Bargain and Sale Deed</i> by and between P.A. Morabito & Co., Limited and the Willard Plaintiffs dated January 20, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353290 | | 10 | 2225-2230 |
| | Exhibit 48: <i>Deed of Trust, Fixture Filing and Security Agreement</i> by and between the Willard Plaintiffs and South Valley National Bank dated February 21, 2006 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3353292 | | 10 | 2231-2248 |
| | Exhibit 49: Proposed <i>First Amendment to Lease Agreement</i> regarding the Virginia Property sent to the Willard Plaintiffs in October 2006 | | 10 | 2249-2251 |

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| (cont 30) | Exhibit 50: <i>Assignment of Entitlements, Contracts, Rents and Revenues</i> by and between Berry-Hinckley Industries and First National Bank of Nevada dated June 29, 2007 regarding the Virginia Property, recorded February 24, 2006 in the Washoe County Recorder's Office as Doc. No. 3551284 | | 10 | 2252-2264 |
| | Exhibit 51: <i>UCC Financing Statement</i> regarding the Virginia Property, recorded July 5, 2007 in the Washoe County Recorder's Office as Doc. No 3551285 | | 10 | 2265-2272 |
| | Exhibit 52: Sales brochure for the Virginia Property prepared by Daniel Gluhaich for marketing purposes in 2012 | | 10 | 2273-2283 |
| 31. | Defendants'/Counterclaimants' Opposition to Larry Willard and Overland Development Corporation's Motion for Summary Judgment – Oral Arguments Requested | 11/13/17 | 10 | 2284-2327 |
| | Exhibit 1: Declaration of Brian R. Irvine | | 10 | 2328-2334 |
| | Exhibit 2: December 12, 2014, Plaintiffs Initial Disclosures | | 10 | 2335-2342 |
| | Exhibit 3: February 12, 2015 Letter | | 10 | 2343-2345 |
| | Exhibit 4: Willard July 2015 Interrogatory Responses, First Set | | 10 | 2346-2357 |
| | Exhibit 5: August 28, 2015, Letter | | 11 | 2358-2369 |
| | Exhibit 6: March 3, 2016, Letter | | 11 | 2370-2458 |
| | Exhibit 7: March 15, 2016 Letter | | 11 | 2459-2550 |
| | Exhibit 8: April 20, 2016, Letter | | 11 | 2551-2577 |
| | Exhibit 9: December 2, 2016, Expert Disclosure of Gluhaich | | 11 | 2578-2586 |

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| (cont 31) | Exhibit 10: December 5, 2016 Email | | 11 | 2587-2593 |
| | Exhibit 11: December 9, 2016 Email | | 11 | 2594-2595 |
| | Exhibit 12: December 23, 2016 Email | | 11 | 2596-2599 |
| | Exhibit 13: December 27, 2016 Email | | 11 | 2600-2603 |
| | Exhibit 14: February 3, 2017, Letter | | 12 | 2604-2631 |
| | Exhibit 15: Willard Responses to Defendants' First Set of Requests for Production of Documents | | 12 | 2632-2641 |
| | Exhibit 16: April 1, 2016 Email | | 12 | 2642-2644 |
| | Exhibit 17: May 3, 2016 Email | | 12 | 2645-2646 |
| | Exhibit 18: June 21, 2016 Email Exchange | | 12 | 2647-2653 |
| | Exhibit 19: July 21, 2016 Email | | 12 | 2654-2670 |
| | Exhibit 20: Defendants' First Set of Interrogatories on Willard | | 12 | 2671-2680 |
| | Exhibit 21: Defendants' Second Set of Interrogatories on Willard | | 12 | 2681-2691 |
| | Exhibit 22: Defendants' First Requests for Production on Willard | | 12 | 2692-2669 |
| | Exhibit 23: Defendants' Second Request for Production on Willard | | 12 | 2700-2707 |
| | Exhibit 24: Defendants' Third Request for Production on Willard | | 12 | 2708-2713 |
| | Exhibit 25: Defendants Requests for Admission to Willard | | 12 | 2714-2719 |
| | Exhibit 26: Willard Lease | | 12 | 2720-2755 |
| | Exhibit 27: Willard Response to Second Set of Interrogatories | | 12 | 2756-2764 |

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| (cont 31) | Exhibit 28: Deposition of L. Willard Excerpt | | 12 | 2765-2770 |
| | Exhibit 29: April 12, 2013 Letter | | 12 | 2771-2773 |
| | Exhibit 30: Declaration of G. Gordon | | 12 | 2774-2776 |
| | Exhibit 31: Declaration of C. Kemper | | 12 | 2777-2780 |
| 32. | Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich | 11/14/17 | 12 | 2781-2803 |
| | Exhibit 1: Plaintiffs' Initial Disclosures | | 12 | 2804-2811 |
| | Exhibit 2: Plaintiffs' Initial Disclosures of Expert Witnesses | | 12 | 2812-2820 |
| | Exhibit 3: December 5, 2016 Email | | 12 | 2821-2827 |
| | Exhibit 4: December 9, 2016 Email | | 12 | 2828-2829 |
| | Exhibit 5: December 23, 2016 Email | | 12 | 2830-2833 |
| | Exhibit 6: December 27, 2016 Email | | 12 | 2834-2837 |
| | Exhibit 7: February 3, 2017 Letter | | 13 | 2838-2865 |
| | Exhibit 8: Deposition Excerpts of D. Gluhaich | | 13 | 2866-2875 |
| | Exhibit 9: Declaration of Brain Irvine | | 13 | 2876-2879 |
| 33. | Defendants' Motion for Partial Summary Judgment – Oral Argument Requested | 11/15/17 | 13 | 2880-2896 |
| | Exhibit 1: Highway 50 Lease | | 13 | 2897-2940 |
| | Exhibit 2: Declaration of Chris Kemper | | 13 | 2941-2943 |
| | Exhibit 3: Wooley Deposition at 41 | | 13 | 2944-2949 |
| | Exhibit 4: Virginia Lease | | 13 | 2950-2985 |

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| (cont 33) | Exhibit 5: Little Caesar's Sublease | | 13 | 2986-3005 |
| | Exhibit 6: Willard Response to Defendants' Second Set of Interrogatories | | 13 | 3006-3014 |
| | Exhibit 7: Willard Deposition at 89 | | 13 | 3015-3020 |
| 34. | Defendants'/Counterclaimants' Motion for Sanctions – Oral Argument Requested | 11/15/17 | 13 | 3021-3058 |
| | Exhibit 1: Plaintiffs' Initial Disclosures | | 13 | 3059-3066 |
| | Exhibit 2: November 2014 Email Exchange | | 13 | 3067-3076 |
| | Exhibit 3: January 2015 Email Exchange | | 13 | 3077-3082 |
| | Exhibit 4: February 12, 2015 Letter | | 13 | 3083-3085 |
| | Exhibit 5: Willard July 2015 Interrogatory Responses | | 14 | 3086-3097 |
| | Exhibit 6: Wooley July 2015 Interrogatory Responses | | 14 | 3098-3107 |
| | Exhibit 7: August 28, 2015 Letter | | 14 | 3108-3119 |
| | Exhibit 8: March 3, 2016 Letter | | 14 | 3120-3208 |
| | Exhibit 9: March 15, 2016 Letter | | 14 | 3209-3300 |
| | Exhibit 10: April 20, 2016 Letter | | 14 | 3301-3327 |
| | Exhibit 11: December 2, 2016 Expert Disclosure | | 15 | 3328-3336 |
| | Exhibit 12: December 5, 2016 Email | | 15 | 3337-3343 |
| | Exhibit 13: December 9, 2016 Email | | 15 | 3344-3345 |
| | Exhibit 14: December 23, 2016 Email | | 15 | 3346-3349 |
| | Exhibit 15: December 27, 2016 Email | | 15 | 3350-3353 |
| | Exhibit 16: February 3, 2017 Letter | | 15 | 3354-3381 |

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| (cont 34) | Exhibit 17: Willard Responses to Defendants' First Set of Requests for Production of Documents 17 | | 15 | 3382-3391 |
| | Exhibit 18: Wooley Deposition Excerpts | | 15 | 3392-3397 |
| | Exhibit 19: Highway 50 Lease | | 15 | 3398-3441 |
| | Exhibit 20: April 1, 2016 Email | | 15 | 3442-3444 |
| | Exhibit 21: May 3, 2016 Email Exchange | | 15 | 3445-3446 |
| | Exhibit 22: June 21, 2016 Email Exchange | | 15 | 3447-3453 |
| | Exhibit 23: July 21, 2016 Letter | | 15 | 3454-3471 |
| | Exhibit 24: Defendants' First Set of Interrogatories on Wooley | | 15 | 3472-3480 |
| | Exhibit 25: Defendants' Second Set of Interrogatories on Wooley | | 15 | 3481-3490 |
| | Exhibit 26: Defendants' First Request for Production of Documents on Wooley | | 15 | 3491-3498 |
| | Exhibit 27: Defendants' Second Request for Production of Documents on Wooley | | 15 | 3499-3506 |
| | Exhibit 28: Defendants' Third Request for Production of Documents on Wooley | | 15 | 3507-3512 |
| | Exhibit 29: Defendants' Requests for Admission on Wooley | | 15 | 3513-3518 |
| | Exhibit 30: Defendants' First Set of Interrogatories on Willard | | 15 | 3519-3528 |
| | Exhibit 31: Defendants' Second Set of Interrogatories on Willard | | 15 | 3529-3539 |
| | Exhibit 32: Defendants' First Request for Production of Documents on Willard | | 15 | 3540-3547 |

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| (cont 34) | Exhibit 33: Defendants' Second Request for Production of Documents on Willard | | 15 | 3548-3555 |
| | Exhibit 34: Defendants' Third Request for Production of Documents on Willard | | 15 | 3556-3561 |
| | Exhibit 35: Defendants' Requests for Admission on Willard | | 15 | 3562-3567 |
| 35. | Plaintiffs' Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions and to Extend the Deadline for Submissions of Dispositive Motions | 12/06/17 | 15 | 3568-3572 |
| 36. | Notice of Non-Opposition to Defendants/Counterclaimants' Motion for Sanctions | 12/07/17 | 16 | 3573-3576 |
| 37. | Notice of Non-Opposition to Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich | 12/07/17 | 16 | 3577-3580 |
| 38. | Notice of Non-Opposition to Defendants/Counterclaimants' Motion for Partial Summary Judgment | 12/07/17 | 16 | 3581-3584 |
| 39. | Order Granting Defendants/Counterclaimants' Motion for Sanctions [Oral Argument Requested] | 01/04/18 | 16 | 3585-3589 |
| 40. | Order Granting Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich | 01/04/18 | 16 | 3590-3594 |
| 41. | Notice of Entry of Order re Defendants' Motion for Partial Summary Judgment | 01/05/18 | 16 | 3595-3598 |

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| 42. | Notice of Entry of Order re Defendants' Motion for Exclude the Expert Testimony of Daniel Gluhaich | 01/05/18 | 16 | 3599-3602 |
| 43. | Notice of Entry of Order re Defendants' Motion for Sanctions | 01/05/18 | 16 | 3603-3606 |
| 44. | Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions | 03/06/18 | 16 | 3607-3640 |
| 45. | Notice of Entry of Findings of Facts, Conclusions of Law and Order | 03/06/18 | 16 | 3641-3644 |
| 46. | Request for Entry of Judgment | 03/09/18 | 16 | 3645-3649 |
| | Exhibit 1: Judgment | | 16 | 3650-3653 |
| 47. | Notice of Withdrawal of Local Counsel | 03/15/18 | 16 | 3654-3656 |
| 48. | Notice of Appearance – Richard Williamson, Esq. and Jonathan Joe Tew, Esq. | 03/26/18 | 16 | 3657-3659 |
| 49. | Opposition to Request for Entry of Judgment | 03/26/18 | 16 | 3660-3665 |
| 50. | Reply in Support of Request for Entry of Judgment | 03/27/18 | 16 | 3666-3671 |
| 51. | Order Granting Defendant/Counterclaimants' Motion to Dismiss Counterclaims | 04/13/18 | 16 | 3672-3674 |
| 52. | Willard Plaintiffs' Rule 60(b) Motion for Relief | 04/18/18 | 16 | 3675-3692 |
| | Exhibit 1: Declaration of Larry J. Willard | | 16 | 3693-3702 |
| | Exhibit 2: Lease Agreement dated 11/18/05 | | 16 | 3703-3738 |
| | Exhibit 3: Letter dated 4/12/13 from Gerald M. Gordon to Steven Goldblatt | | 16 | 3739-3741 |

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| (cont 52) | Exhibit 4: Operation and Management Agreement dated 5/1/13 | | 16 | 3742-3746 |
| | Exhibit 5: 13 Symptoms of Bipolar Disorder | | 16 | 3747-3749 |
| | Exhibit 6: Emergency Protective Order dated 1/23/18 | | 16 | 3750-3752 |
| | Exhibit 7: Pre-Booking Information Sheet dated 1/23/18 | | 16 | 3753-3755 |
| | Exhibit 8: Request for Domestic Violence Restraining Order, filed 1/31/18 | | 16 | 3756-3769 |
| | Exhibit 9: Motion for Summary Judgment of Plaintiffs Larry J. Willard and Overland Development Corporation, filed October 18, 2017 | | 16 | 3770-3798 |
| 53. | Opposition to Rule 60(b) Motion for Relief | 05/18/18 | 17 | 3799-3819 |
| | Exhibit 1: Declaration of Brian R. Irvine | | 17 | 3820-3823 |
| | Exhibit 2: Transfer of Hearing, January 10, 2017 | | 17 | 3824-3893 |
| | Exhibit 3: Transfer of Hearing, December 12, 2017 | | 17 | 3894-3922 |
| | Exhibit 4: Excerpt of deposition transcript of Larry Willard, August 21, 2015 | | 17 | 3923-3924 |
| | Exhibit 5: Attorney status according to the California Bar | | 17 | 3925-3933 |
| | Exhibit 6: Plaintiff's Initial Disclosures, December 12, 2014 | | 17 | 3934-3941 |
| 54. | Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion for Relief | 05/29/18 | 17 | 3942-3950 |

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| (cont 54) | Exhibit 1: Declaration of Larry J. Willard in Response to Defendants' Opposition to Rule 60(b) Motion for Relief | | 17 | 3951-3958 |
| | Exhibit 2: Text messages between Larry J. Willard and Brian Moquin Between December 2 and December 6, 2017 | | 17 | 3959-3962 |
| | Exhibit 3: Email correspondence between David O'Mara and Brian Moquin | | 17 | 3963-3965 |
| | Exhibit 4: Text messages between Larry Willard and Brian Moquin between December 19 and December 25, 2017 | | 17 | 3966-3975 |
| | Exhibit 5: Receipt | | 17 | 3976-3977 |
| | Exhibit 6: Email correspondence between Richard Williamson and Brian Moquin dated February 5 through March 21, 2018 | | | 3978-3982 |
| | Exhibit 7: Text messages between Larry Willard and Brian Moquin between March 30 and April 2, 2018 | | 17 | 3983-3989 |
| | Exhibit 8: Email correspondence Between Jonathan Tew, Richard Williamson and Brian Moquin dated April 2 through April 13, 2018 | | 17 | 3990-3994 |
| | Exhibit 9: Letter from Richard Williamson to Brian Moquin dated May 14, 2018 | | 17 | 3995-3997 |
| | Exhibit 10: Email correspondence between Larry Willard and Brian Moquin dated May 23 through May 28, 2018 | | 17 | 3998-4000 |
| | Exhibit 11: Notice of Withdrawal of Local Counsel | | 17 | 4001-4004 |
| 55. | Order re Request for Entry of Judgment | 06/04/18 | 17 | 4005-4009 |

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| 56. | Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply | 06/06/18 | 17 | 4010-4018 |
| | Exhibit 1: Sur-Reply in Support of Opposition to the Willard Plaintiffs' Rule 60(b) Motion for Relief | | 17 | 4019-4036 |
| 57. | Opposition to Defendants' Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply | 06/22/18 | 18 | 4037-4053 |
| 58. | Reply in Support of Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply | 06/29/18 | 18 | 4054-4060 |
| 59. | Order Denying Plaintiffs' Rule 60(b) Motion for Relief | 11/30/18 | 18 | 4061-4092 |
| 60. | Notice of Entry of Order re Order Denying Plaintiffs' Rule 60(b) Motion for Relief | 12/03/18 | 18 | 4093-4096 |
| | Exhibit 1: Order Denying Plaintiffs' Rule 60(b) Motion for Relief | | 18 | 4097-4129 |
| 61. | Judgment | 12/11/18 | 18 | 4130-4132 |
| 62. | Notice of Entry of Order re Judgment | 12/11/18 | 18 | 4133-4136 |
| | Exhibit 1: December 11, 2018 Judgment | | 18 | 4137-4140 |
| 63. | Notice of Appeal | 12/28/18 | 18 | 4141-4144 |
| | Exhibit 1: Finding of Fact, Conclusion of Law, and Order on Defendants' Motions for Sanctions, entered March 6, 2018 | | 18 | 4145-4179 |
| | Exhibit 2: Order Denying Plaintiffs' Rule 60(b) Motion for Relief, entered November 30, 2018 | | 18 | 4180-4212 |
| | Exhibit 3: Judgment, entered December 11, 2018 | | 18 | 4213-4216 |

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| <u>TRANSCRIPTS</u> | | | | |
| 64. | Transcript of Proceedings – Status Hearing | 08/17/15 | 18 | 4217-4234 |
| 65. | Transcript of Proceedings - Hearing on Motion for Partial Summary Judgment | 01/10/17 | 19 | 4235-4303 |
| 66. | Transcript of Proceedings - Pre-Trial Conference | 12/12/17 | 19 | 4304-4331 |
| 67. | Transcript of Proceedings - Oral Arguments – Plaintiffs’ Rule 60(b) Motion (condensed) | 09/04/18 | 19 | 4332-4352 |
| <u>ADDITIONAL DOCUMENTS</u> | | | | |
| 68. | Order Granting Defendants’ Motion for Partial Summary Judgment [Oral Argument Requested] ¹ | 01/04/18 | 19 | 4353-4357 |

¹ This document was inadvertently omitted earlier. It was added here because all of the other papers in the 19-volume appendix had already been numbered.

1 **2645**

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9 *Attorney for Defendants*
10 *Berry Hinckley Industries, and*
Jerry Herbst

11 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
12 **IN AND FOR THE COUNTY OF WASHOE**

13 _____
14 LARRY J. WILLARD, individually and as
trustee of the Larry James Willard Trust Fund;
15 OVERLAND DEVELOPMENT
CORPORATION, a California corporation;
16 EDWARD E. WOOLEY AND JUDITH A.
WOOLEY, individually and as trustees of the
17 Edward C. Wooley and Judith A. Wooley
Intervivos Revocable Trust 2000,

CASE NO. CV14-01712
DEPT. 6

18 Plaintiff,

19 vs.

20 BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation; and JERRY HERBST, an
21 Individual;

22 Defendants.
23 _____/

24 BERRY-HINCKLEY INDUSTRIES, a
Nevada corporation; and JERRY HERBST,
25 an individual;

26 Counterclaimants,

27 vs
28

LARRY J. WILLARD, individually and as
trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
CORPORATION, a California corporation;

Counter-defendants.

OPPOSITION TO RULE 60(b) MOTION FOR RELIEF

Defendants/Counterclaimants Berry-Hinckley Industries (“BHI”) and Jerry Herbst (collectively the “Defendants”) by and through their counsel of record, Dickinson Wright, PLLC, respectfully submit this Opposition to Plaintiffs Larry J. Willard and Overland Development Corporation’s (collectively “Plaintiffs”) Rule 60(b) Motion for Relief (the “Rule 60(b) Motion”). This Opposition is based upon the following Memorandum of Points and Authorities and exhibits thereto, the Declaration of Brian R. Irvine, attached as **Exhibit 1**, the pleadings and papers on file herein and any other material this Court may wish to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court’s March 6, 2018 Findings of Fact, Conclusions of Law, and Order on Defendants’ Motion for Sanctions (“Sanctions Order”) dismissed Plaintiffs’ claims due to: (1) Plaintiffs’ refusal, during the more than three years that this case has been on file, to provide the damages computations required under NRCP 16.1(a)(1)(C), despite their obligations under the NRCP and in direct violation of this Court’s Orders; (2) Plaintiffs’ refusal to provide an expert disclosure of Daniel Gluhaich in compliance with NRCP 16.1(a)(2)(B), again despite their obligations under the NRCP and in direct violation of this Court’s Orders; (3) Plaintiffs’ bad faith, strategic decision to file a summary judgment motion only weeks before the close of discovery, in which they requested brand new, never-disclosed types and categories of damages, which was supported in large part by an affidavit containing the undisclosed opinions of Mr. Gluhaich and undisclosed documents; and (4) the prejudice Plaintiffs’ actions caused to Defendants by depriving them of the opportunity to conduct discovery on and rebut Plaintiffs’

1 claimed damages. *See* Sanctions Order. The Sanctions Order dismissed Plaintiffs' claims
2 because their numerous discovery violations were willful and because Plaintiffs acted in bad
3 faith by waiting until the close of discovery to ambush Defendants with summary judgment
4 motions with new types and categories of damages in an amount that tripled what Plaintiffs
5 sought in their Amended Complaint, "while such alleged damages were based upon information
6 that has been in Plaintiffs' possession for the entire pendency of this case." *Id.* at ¶128; *see also*
7 ¶73.

8 Plaintiffs' Rule 60(b) Motion now requests that this Court set aside its Sanctions Order,
9 claiming that their violation of discovery rules and refusal to comply with this Court's Orders
10 were not willful, and were instead caused solely by their prior attorney, Brian Moquin's, failure
11 "to properly prosecute this case due to a serious mental illness and a personal life that was
12 apparently in shambles," and arguing that these circumstances constitute excusable neglect
13 under NRCP 60(b). Rule 60(b) Motion at 1-2. However, this Court should deny the Rule 60(b)
14 Motion for several reasons, each of which forms a separate basis for denial.

15 First, Plaintiffs' claimed factual scenario, that Mr. Moquin suffers from bipolar disorder
16 and that Mr. Moquin's personal life was in a shambles, is not supported by any competent,
17 admissible evidence. Instead, the Rule 60(b) Motion is supported only by the Declaration of
18 Plaintiff Larry Willard (Rule 60(b) Motion at Exhibit 1), which contains statements about Mr.
19 Moquin that can only be described as rank hearsay, speculation and inappropriate and
20 unqualified lay expert opinions, and by several documents related to alleged domestic violence
21 by Mr. Moquin against his family (Rule 60(b) Motion at Exhibits 6-8), which cannot be
22 authenticated so as to be admitted into evidence and which also contain inadmissible hearsay.

23 Second, even if the materials submitted by Plaintiffs in support of the Rule 60(b) Motion
24 were admissible, they still do not set forth facts constituting excusable neglect and justifying the
25 relief sought by Plaintiffs. This Court's Sanctions Order shows that Plaintiffs' discovery abuses
26 and refusal to comply with this Court's Orders started at the very beginning of this case and
27 continued until dismissal. Plaintiffs' attorneys, which included not only Mr. Moquin, but also
28

1 local counsel, David O'Mara, did not fail to prosecute this case and did not abandon their
2 clients. Instead, as noted in the Sanctions Order, Plaintiffs and their attorneys simply chose to
3 pick and choose when they wanted to follow the NRCP and this Court's Orders, and when they
4 did not. Certainly, Plaintiffs and their attorneys were abundantly aware that they were not
5 complying with the NRCP and this Court's Orders, as they attended hearings where such issues
6 were addressed and signed multiple stipulations continuing trial to allow Plaintiffs time to
7 remedy their failures. And, rather than choosing to comply with the Rules and this Court's
8 Orders, Plaintiffs waited until the virtual close of discovery to file significant summary
9 judgment motions seeking millions of dollars of damages based on a model that was never
10 disclosed or supported in discovery. Mr. Moquin's alleged condition, even if true, does not
11 explain or excuse Plaintiffs' years of litigation choices. And, Plaintiffs' arguments are belied by
12 the fact that Mr. Moquin was able to prepare and file Plaintiffs' summary judgment motions.
13 These facts, even if Plaintiffs were able to prove them, do not constitute excusable neglect
14 under NRCP 60(b) and Nevada caselaw.

15 In addition, Plaintiff Larry Willard's role in this case shows that no excusable neglect
16 exists. Mr. Willard claims, on the one hand, that he "was making ongoing efforts on almost a
17 daily basis to push the case forward." Rule 60(b) Motion at Exhibit 1, ¶83. Certainly, this
18 statement is corroborated by the fact that Mr. Willard personally attended the hearing on
19 January 10, 2017, where Defendants raised Plaintiffs' failure to provide damages computations
20 and an appropriate expert disclosure of Mr. Gluhaich in open court. And, Mr. Willard provided
21 an affidavit supporting Plaintiffs' summary judgment motion (which was 22 pages long and
22 supported by 52 exhibits) in October 2017 without Plaintiffs having rectified their lack of
23 damages computation or expert disclosure. Despite Mr. Willard's involvement the case, he
24 claims, on the other hand, that Mr. Moquin's alleged condition should excuse all of Plaintiffs'
25 discovery failures. However, Mr. Willard admits that he was aware of Mr. Moquin's personal
26 financial problems and that he loaned Mr. Moquin money to assuage those problems, that he
27 was aware of Mr. Moquin's alleged psychological problems and loaned him money for
28

1 treatment, and that he was aware that Mr. Moquin was not responsive prior to the dismissal of
2 his claims yet did nothing because he was not financially able to hire new counsel (though he
3 was apparently able to obtain funds to allow him to hire his current counsel). This does not
4 constitute excusable neglect.

5 Furthermore, Plaintiffs' Rule 60(b) Motion focuses only on the alleged problems of Mr.
6 Moquin and attempts to use those problems as a magic bullet that would excuse all of Plaintiffs'
7 failures and reinstate their claims. However, the Rule 60(b) Motion is wholly silent as to the
8 role of Plaintiffs' other attorney of record, David O'Mara. Mr. O'Mara, who is bound by
9 Supreme Court Rule 42, was obligated to "actively participate in the representation" of
10 Plaintiffs and is "responsible to the court...for the administration of any proceeding that is
11 subject to this rule and for compliance with all state and local rules of practice." Mr. O'Mara's
12 failure to comply with SCR 42, the NRCP and this Court's Orders does not support a finding of
13 excusable neglect.

14 Finally, the relief sought by Plaintiffs would unduly burden Defendants. Plaintiffs'
15 remedy would essentially require the parties to start discovery from scratch on all of Plaintiffs'
16 damages claims, including their brand new claims for liquidated damages, diminution in value
17 damages, property damages and default interest. This would be patently unfair to Defendants,
18 who have already had to spend hundreds of thousands of dollars litigating this case in two states
19 for more than five years.

20 While Plaintiffs may have remedies against their attorneys for the dismissal of this
21 action, there are simply no grounds for this Court to grant the relief sought by Plaintiffs here,
22 and this Court should deny the Rule 60(b) Motion in its entirety.

23 **II. FACTUAL AND PROCEDURAL HISTORY**

24 This Court is already aware of the factual and procedural history of this case leading up
25 to the filing of Defendants' Motion for Sanctions (*see* November 15, 2017 Motion for
26 Sanctions; *see also* Sanctions Order), and Defendants will not repeat that history in its entirety
27 here. However, it bears repeating that Plaintiffs, throughout the entirety of this case, have
28

continually and repeatedly ignored Nevada law, this Court's express orders, and Defendants' many requests for threshold, mandatory information, only to ambush Defendants with summary judgment motions containing a barrage of new alleged damages, expert opinions, and documents at the virtual close of discovery, meaning that it was too late for Defendants to meaningfully respond to those motions.

Specifically, Plaintiffs failed to provide a damages computation in their initial disclosures (Sanctions Order at ¶12), failed to ever provide damages computations despite numerous letters from Plaintiffs to both Mr. Moquin and Mr. O'Mara demanding such disclosures (*id.* at ¶¶14-16, 25, 27-33, 39, 43-44 and 51-54), failed to provide adequate responses to interrogatories demanding information about Plaintiffs' damages, despite this Court's Order granting Defendants' Motion to Compel (*id.* at ¶¶17-25), and failed to comply with this Court's Order issued after the parties discussed Plaintiffs' lack of damages computations at the January 10, 2017 hearing attended by Mr. Moquin, Mr. O'Mara and Mr. Willard, which required Plaintiffs to provide damages computations and supporting materials. *Id.* at ¶¶46-49, 54, 59-64 and 67-68; *see also* **Exhibit 2**, Transcript of January 10, 2017 hearing at pp. 61-63 and 68.

Plaintiffs also admittedly failed to properly disclose Mr. Gluhaich as an expert in this case. *Id.* at ¶¶34-37. And, Plaintiffs failed to ever provide an amended disclosure of Mr. Gluhaich, again despite multiple letters from Defendants demanding an amended disclosure (*id.* at ¶¶38-45), and despite this Court's express Order following the January 10, 2017 hearing. *Id.* at ¶¶50-64.

Discovery in this matter was set to close in mid-November 2017. *See* February 9, 2017 Stipulation and Order to Continue Trial, on file herein. On October 18, 2017, less than a month before the close of discovery, Plaintiffs filed a Motion for Summary Judgment seeking more than triple the amount of damages sought in their complaint.¹ Sanctions Order at ¶¶69 and 73.

¹ The Wooley Plaintiffs also filed a summary judgment motion on the same date. Sanctions Motion at ¶69. The Wooley Plaintiffs' motion included a 16 page brief and 22 exhibits totaling almost 500 pages. (On file herein).

1 Plaintiffs' motion included a 22 page brief and 52 exhibits totaling almost 450 pages. (On file
2 herein). Plaintiffs' motion sought previously undisclosed damages and was supported by
3 previously undisclosed expert opinions and documents. Sanctions Order at ¶¶ 74-79.

4 Defendants opposed Plaintiffs' summary judgment motions and filed their Motion for
5 Sanctions. Defendants granted Plaintiffs several extensions of time to file an opposition to the
6 Motion for Sanctions, but no opposition was filed. Plaintiffs then filed a December 6, 2017
7 Request for an extension to oppose the Motion for Sanctions. *Id.* at ¶94. The Court held a status
8 conference on December 12, 2017, which was attended by both Mr. Moquin and Mr. O'Mara,
9 where the Court granted Plaintiffs' Request for Extension and directed Plaintiffs to respond no
10 later than Monday, December 18, 2017, at 10 AM. *Id.* at ¶95. The Court further directed
11 Defendants to reply no later than January 8, 2018, and set the parties' Motions for oral argument
12 on January 12, 2018. *Id.* at ¶96. The Court also admonished Plaintiffs that "you need to know
13 going into these oppositions, that I'm very seriously considering granting all of it . . . you know
14 going into this motion for sanctions that you're—I haven't decided it, but I need to see
15 compelling opposition not to grant it." **Exhibit 3**, December 12, 2017 transcript of status
16 conference.

17 As this Court is aware, Plaintiffs did not file any opposition to Defendants' Motion for
18 Sanctions by December 18 or any time thereafter, nor did Plaintiffs request any further
19 extension. Accordingly, this Court issued a January 4, 2018 Order Granting the Motion for
20 Sanctions, and then issued its Sanctions Order on March 6, 2018.

21 **III. LEGAL ARGUMENT**

22 **A. Standard of Review**

23 Under NRCP 60(b)(1), the district court may relieve a party from a final judgment on
24 grounds of mistake, inadvertence, surprise, or excusable neglect. NRCP 60(b)(1). The presence
25 of the following factors indicates that the requirements of this rule have been satisfied: (1) a
26 prompt application to remove the judgment; (2) an absence of an intent to delay the
27 proceedings; (3) a lack of knowledge of the procedural requirements on the part of the moving
28

party; and (4) good faith. *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). A showing of a meritorious defense to the action is also required. *Deros v. Stern*, 87 Nev. 148, 152, 483 P.2d 648, 650 (1971).

A party seeking to set aside an order pursuant to NRCP 60(b) “has the burden to prove mistake, inadvertence, surprise, or excusable neglect by a preponderance of the evidence.” *Polivka v. Kuller*, 128 Nev. 926, 381 P.3d 651 (2012) (citations omitted); *see also Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 446, 488 P.2d 911, 915 (1971) (“[t]he burden of proof on [a motion to set aside under Rule 60(b)] is on the moving party who must establish his position by a preponderance of the evidence.”) (quoting *Luz v. Lopes*, 55 Cal.2d 54, 10 Cal.Rptr. 161, 166, 358 P.2d 289, 294 (1960)).

B. The Rule 60(b) Motion is not supported by competent evidence

Plaintiffs’ sole argument to set aside the Sanction Order is that Mr. Moquin “failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles.” Rule 60(b) Motion at 1. However, Plaintiffs have failed to support this argument with any competent, admissible evidence. This is fatal to the Rule 60(b) Motion. While a “district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b),” *Stoecklein v. Johnson Electric, Inc.*, 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), “this discretion is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action.” *Id.* (emphasis added) (citing *Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979 (1959)); *see also Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (holding that a court abuses its discretion when its decision is not supported by substantial evidence; substantial evidence being “defined as that which a reasonable mind might accept as adequate to support a conclusion” (internal quotation marks omitted)).

The Rule 60(b) Motion purports to support its arguments primarily through the Declaration of Mr. Willard. Mr. Willard’s Declaration includes several statements about Mr. Moquin’s alleged psychological condition. Mr. Willard states that he is “convinced” that Mr.

Moquin was dealing with issues and demons beyond his control (*see* Rule 60(b) Motion at Exhibit 1, ¶66), that he “learned” that Mr. Moquin was struggling with a constant marital conflict that greatly interfered with his work (*id.* at ¶67), that Mr. Moquin suffered a “total mental breakdown” (*id.* at ¶68), that Mr. Moquin explained to Mr. Willard that he had been diagnosed with bipolar disorder (*id.* at 70), that he believes Mr. Moquin’s disorder to be “severe and debilitating” (*id.* at ¶73), that he now sees “that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on the case (*id.* at ¶76) and that he can now see how Mr. Moquin’s alleged psychological issues affected his case. *Id.* at ¶87.

Clearly, Mr. Willard does not have personal knowledge that would allow him to testify as to any of these alleged facts, and such testimony is thus barred by NRS 50.025.² The testimony that Mr. Willard purports to provide addresses Mr. Moquin’s personal mental status and the status of his marriage. Mr. Willard could not have obtained this information by observing it, and he does not testify that it is based on his own perceptions. Instead, he could only have obtained the information from Mr. Moquin himself (or from Mr. Moquin’s wife) and his testimony thus constitutes inadmissible hearsay under NRS 51.035³ and 51.065,⁴ as there are no exceptions to the hearsay rule that apply.⁵ *See Agnello v. Walker*, 306 S.W.3d 666, 675

² NRS 50.025(1) provides that “[a] witness may not testify to a matter unless . . . [e]vidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter; or [t]he witness states his or her opinion or inference as an expert.”

³ NRS 51.035 defines hearsay as “a statement offered in evidence to prove the truth of the matter asserted.”

⁴ NRS 51.065 provides that “[h]earsay is inadmissible except as provided in this chapter, title 14 of NRS and the Nevada Rules of Civil Procedure.”

⁵ To the extent that Plaintiffs attempt to argue that NRS 51.105 provides an exception to the hearsay rule under these circumstances, such argument is unavailing, as Mr. Willard does not testify as to any contemporaneous statements that Mr. Moquin made about his own present physical symptoms or feelings. *See* 2 McCormick on Evid. §273 (7th ed.) (“[s]tatements of the declarant’s present bodily condition and symptoms, including pain and other feelings, offered to prove the truth of the statements, have been generally recognized as an exception to the hearsay rule. Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement.”) (emphasis added). The statement that Mr. Willard included, that “Mr.

(Mo.App. 2010) (hearsay testimony or documentation cannot serve as the evidence necessary to meet movant's burden of persuasion to set aside judgment under Rule 60); *New Image Industries v. Rice*, 603 So.2d 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation). If Mr. Willard did not obtain the information through hearsay, then he is clearly speculating, as he does not testify that he personally observed Mr. Moquin's alleged condition and, even if he had, he is unqualified to speculate as to what that condition meant and what it caused.

Furthermore, the statements made by Mr. Willard attempting to describe how Mr. Moquin's alleged condition might manifest with symptoms and how those symptoms may have affected Mr. Moquin's work (*see* Rule 60(b) Motion at Exhibit 1, ¶¶73-76 and 87-88), are likewise inadmissible as inappropriate lay opinion testimony under NRS 50.265.⁶ Certainly, Mr. Willard does not testify that he personally observed any of these symptoms, and thus the

Moquin explained [to Mr. Willard] that Dr. Mar diagnosed him with bipolar disorder" *see* Rule 60(b) Motion at ¶69, does not address Mr. Moquin's then present physical condition or symptoms; instead that statement contains hearsay within hearsay, and is thus inadmissible under NRS 51.067. Moreover, the cases cited by Plaintiffs for the notion that an attorney's mental illness constitutes excusable neglect include sworn statements from the attorney describing his own mental illness, and most also include testimony from the attorney's physician. *See United States v. Cirami*, 563 F.2d 26, 31 (2d Cir. 1977) (attorney's affidavit and a letter from his psychologist indicated he was suffering from a mental disorder and was being treated); *Boehner v. Heise*, 2009 WL 1360975 at *3 (S.D.N.Y. May 14, 2009) (attorney's declaration and psychologist's written evaluation indicated attorney's psychological condition caused him to stop practicing law); *Cobos v. Adelphi University*, 179 F.R.D. 381, 388 (E.D.N.Y. 1998) ("[i]n support of the clients' motion to vacate, both the attorney and her psychiatrist submitted affidavits detailing the severity of the attorney's illness"); *see also Passerelli v. J-Mar Development, Inc.*, 102 Nev. 283, 285 (1986) (record showed that attorney was suffering from substance abuse problems that caused him to close his practice and seek medical treatment).

⁶ NRS 50.265 provides that: "[i]f the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

1. Rationally based on the perception of the witness; and
2. Helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue."

1 testimony is not based upon his own perceptions. And, he is wholly unqualified to testify about
2 what condition Mr. Moquin may have, or the effect of that condition on his work.⁷ “While lay
3 witnesses may testify to the attitude and demeanor of the defendant, lay witnesses cannot
4 express an opinion as to the existence of a particular mental disease or condition.” *White v.*
5 *Corn*, 616 S.E.2d 49, 54, 46 Va.App. 123, 134 (2005) (citations omitted).

6 Finally, the documents attached as Exhibit 6, 7 and 8 to the Rule 60(b) Motion regarding
7 Mr. Moquin’s alleged domestic abuse of his family are inadmissible as they cannot be
8 authenticated by Mr. Willard. He is not the author of the documents and has no personal
9 knowledge of their authenticity and therefore cannot authenticate or identify the documents
10 pursuant to NRS 52.015(1)⁸ or NRS 52.025.⁹ And, the documents do not meet the requirements
11 of NRS 52.115 (as the Rule 60(b) Motion does not include “a final certification as to the
12 genuineness of the signature and official position” by “a person authorized by the laws of a
13 foreign country to make the execution or attestation . . . executed or attested in [that] person’s
14 official capacity”) by or NRS 52.125 (as Exhibits 6-8 to the Rule 60(b) Motion are not certified
15 copies of public records) such that the authenticity of the documents may be presumed. Even if
16 the documents could be authenticated, their contents, apparently authored by Mr. Moquin’s
17 wife, would still be inadmissible hearsay.

18 Plaintiffs do not provide any other purported evidence for their argument about Mr.
19 Moquin’s alleged condition. As none of Plaintiffs’ support for their argument about Mr.
20 Moquin’s alleged condition constitutes competent, admissible evidence, this Court should deny
21 the Rule 60(b) Motion. *See Stoecklein*, 109 Nev. at 271.

22
23 ⁷ Mr. Willard, who is retired, earned a living as a real estate developer. **Exhibit 4**, relevant
24 portions of the Transcript of August 21, 2015 deposition of Larry Willard at 13:22-16:25.

25 ⁸ NRS 52.015(1) provides that: “[t]he requirement of authentication or identification as a
26 condition precedent to admissibility is satisfied by evidence or other showing sufficient to
support a finding that the matter in question is what its proponent claims.”

27 ⁹ NRS 52.025 provides that: “[t]he testimony of a witness is sufficient for authentication or
28 identification if the witness has personal knowledge that a matter is what it is claimed to be.”

C. **Even accepting Plaintiffs’ evidence in support of the Rule 60(b) Motion, Plaintiffs fail to meet their burden under Rule 60(b) to set aside the Sanctions Order**

Under Nevada law, “clients must be held accountable for the acts and omissions of their attorneys.” *Huckaby Props. v. NC Auto Parts*, 130 Nev. Adv. Op. 23, 322 P.3d 429, 433 (2014) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 396-97, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). This is due to the fact that the client “voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts of omissions of this freely selected agent.” *Huckaby Props.*, 322 P.3d at 433 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)).

In *Huckaby Props.*, the Nevada Supreme Court dismissed an appeal where appellant’s counsel failed to file an opening brief following two granted extensions and a Court order granting appellants a final extension. *Huckaby Props.*, 322 P.3d at 437. In that case the appellant was represented by not one, but two attorneys. *Id.* at 431. In dismissing the appeal, the Court held that:

While Nevada's jurisprudence expresses a policy preference for merits-based resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this court's decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief ... and an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations, such as case and docket management. As for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles, under which a client is bound by its civil attorney's actions or inactions.

Id. at 437.

The Court in *Huckaby Props.* recognized a possible exception “to the general agency rule that the ‘sins’ of the lawyer are visited upon his client where the lawyer's addictive disorder and abandonment of his legal practice . . . justified relief for the victimized client.” *Id.* at 434 n.4 (citing *Passarelli*, 102 Nev. at 286). However, the exception noted by the Court in *Huckaby*

1 *Props.* is not present here, as the facts of *Pasarelli* are readily distinguished. First, the Court in
 2 *Passarelli* was presented with evidence in the record that the attorney was the victim of
 3 substance abuse that led to him not coming to the office, missing most appointments and
 4 becoming unable to function. *Passarelli*, 102 Nev. at 285. Second, the attorney in *Passarelli*
 5 voluntarily closed his law practice. *Id.* Third, he was transferred to disability inactive status by
 6 the Nevada Bar. *Id.* Finally, and perhaps most importantly, the client in *Passarelli* had only one
 7 attorney. *Id.* None of these facts are present in this case. As discussed above, there is no
 8 competent evidence about Mr. Moquin's problems before this Court, and no evidence
 9 whatsoever regarding him missing meetings or failing to come to the office. There is no
 10 evidence that Mr. Moquin closed his law practice, and he is still on active status according to
 11 the California Bar. *See Exhibit 5.*¹⁰ And, unlike the client in *Passarelli*, Plaintiffs had not one,
 12 but two attorneys in place to protect their interests.

13 The Court's analysis in *Huckaby*, when applied to the facts here, compels the conclusion
 14 that the Rule 60(b) Motion must be denied. The standard for "excusable neglect" based upon the
 15 activities of a party's attorney requires that the attorney be completely unable to respond or
 16 appear in the proceedings. *See Passarelli*, 102 Nev. at 285 (court found excusable neglect where
 17 attorney failed to attend trial due to psychiatric disorder which caused him to shut down his
 18 practice and be placed on disability inactive status by the State Bar of Nevada); *see also*
 19 *Cicerchia v. Cicerchia*, 77 Nev. 158, 160-61, 360 P.2d 839, 841 (1961) (court found excusable
 20 neglect where respondent lived out of state and suffered nervous breakdown shortly after
 21 retaining out of state counsel, who was unaware and uninformed of the time to appear).

22 Here, Plaintiffs' attorneys did not completely abandon the case. Plaintiffs' two separate
 23 attorneys simply chose to continually and repeatedly ignore the NRCP, this Court's express
 24 orders, and Defendants' many requests for damages computations and expert disclosures, only
 25 to ambush Defendants with their summary judgment motions containing new and undisclosed
 26

27 ¹⁰ Attorney Search – Brian P. Moquin, The State Bar of California,
 28 <http://members.calbar.ca.gov/fal/Member/Detail/257583> (last visited May 17, 2018).

1 alleged damages, expert opinions, and documents at the virtual close of discovery. Plaintiffs
2 attempt to excuse all of that behavior with their vague claims that at some non-specific time
3 during this case Mr. Moquin suffered a breakdown and was diagnosed with bipolar disorder.
4 However, as discussed above (and more fully in Plaintiffs' November 15, 2017 Motion for
5 Sanctions), Plaintiffs' refusal to comply with the NRCP and this Court's orders is ubiquitous
6 and goes back years. Even if Mr. Moquin suffered some sort of breakdown in December 2017
7 or January 2018 that prevented him from opposing the Motion for Sanctions, Mr. O'Mara was
8 still present as counsel of record, could have taken the lead or at least informed the Court of Mr.
9 Moquin's alleged non-responsiveness, yet elected to do nothing. And, at the time the Motion for
10 Sanctions was pending, this Court had already recognized the seriousness of Plaintiffs'
11 violations and indicated that it was considering dismissal based on those violations. *See Exhibit*
12 **3**, Transcript of December 12, 2017 hearing (where this Court admonished Plaintiffs that "you
13 need to know going into these oppositions, that I'm very seriously considering granting all of it
14 ... you know going into this motion for sanctions that you're—I haven't decided it, but I need to
15 see compelling opposition not to grant it.").

16 Plaintiffs' claims about Mr. Moquin's condition cannot excuse their years of bad acts in
17 this case, or their bad faith in filing the summary judgment motions at the eleventh hour
18 supported by undisclosed damages, expert opinions and documents. And, it is disingenuous to
19 argue that Mr. Moquin completely abandoned Plaintiffs and was rendered unable to work by his
20 condition when he was able to, among other things, participate in several depositions, file a
21 lengthy opposition to Defendants' motion for partial summary judgment and participate in oral
22 argument on that motion, and to file two summary judgment motions totaling almost 40 pages
23 of briefing and supported by more than 70 exhibits, including detailed declarations. As a party
24 "cannot be relieved from a judgment taken against him in consequence of the neglect,
25 carelessness, forgetfulness, or inattention of his attorney," *Cicerchia*, 77 Nev. at 161, this Court
26 should deny the Rule 60(b) Motion.

2. **Plaintiffs knew of Mr. Moquin's alleged condition and alleged non-responsiveness prior to the Sanctions Order, yet chose to do nothing for financial reasons and therefore cannot show excusable neglect**

In Mr. Willard's declaration in support of the Rule 60(b) Motion, Mr. Willard admits that he knew that Mr. Moquin was having personal financial difficulties and that he borrowed money from friends and family to fund Mr. Moquin's personal expenses. Rule 60(b) Motion at Exhibit 1, ¶¶63-65. Mr. Willard also admits that he became aware at some point that Mr. Moquin had suffered a complete mental breakdown, that he recommended a psychiatrist to Mr. Moquin and that he again borrowed money from a friend to pay for Mr. Moquin's treatment. *Id.* at ¶¶68-71. Therefore, it is abundantly clear that Mr. Willard was fully-aware of Mr. Moquin's alleged problems, yet continued to allow Mr. Moquin to represent Plaintiffs. However, despite Mr. Willard's knowledge of Mr. Moquin's problems and his decision to continue with Mr. Moquin as Plaintiffs' attorney, Plaintiffs now claim that Mr. Moquin's alleged problems constitute excusable neglect and ask this Court to set aside the Sanctions Order. This Court should reject Plaintiffs' argument, as Plaintiffs certainly bear significant culpability for the actions of Mr. Moquin, about which Plaintiffs now complain, based upon Mr. Willard's knowledge of Mr. Moquin's condition and his decision to allow Mr. Moquin to continue to serve as his attorney. This is another significant difference between this case and the cases upon which Plaintiffs rely in the Rule 60(b) Motion, where the parties were all unaware of their attorneys' problems. *See Passarelli*, 102 Nev. at 286 ("Passarelli was effectually and unknowingly deprived of legal representation") (emphasis added); *U.S. v. Cirami*, 563 F.2d at 29-31 (client discovered that attorney had a mental disorder that prevented him from opposing summary judgment more than two years later); *Boehner*, 2009 WL 1360975 at *2 (client did not learn that case had been dismissed or learn of attorney's mental condition until several months after dismissal).

In addition, Mr. Willard admits that he was informed by Mr. O'Mara prior to the dismissal of his claims that Mr. Moquin was not responsive, but decided to do nothing about it due to financial reasons. Rule 60(b) Motion at Exhibit 1, ¶81. Plaintiffs' inaction, when armed

with this knowledge, is inexcusable, as Plaintiffs had a duty to exercise diligence to ascertain the status of their case. Indeed, one of the cases cited by Plaintiffs in the Rule 60(b) Motion stands for the proposition that even “where an attorney's mishandling of a movant's case stems from the attorney's mental illness,” which might justify relief under Rule 60(b), “client diligence must still be shown.” *Cobos*, 179 F.R.D. at 388; *see also Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) (“A party has a duty of diligence to inquire about the status of a case....”); *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985) (“This Court has pointedly announced that a party has a duty of diligence to inquire about the status of a case....”).

Plaintiffs did not exercise diligence to discover the status of their case and fix the problems with their case despite ample knowledge of Mr. Moquin’s alleged issues. And, Mr. Willard’s claim that he had no choice but to continue working with Mr. Moquin due to financial shortcomings rings hollow, as he was able to borrow money to fund Mr. Moquin’s personal life and medical treatment (and presumably to pay for his new attorneys). Plaintiffs have failed to demonstrate excusable neglect, and this Court should deny the Rule 60(b) Motion.

3. Plaintiffs’ Rule 60(b) Motion should be denied because they had multiple attorneys working on the case, both of which had an obligation to ensure compliance with the NRCPP and this Court’s Orders

Further, Plaintiffs’ Rule 60(b) Motion blatantly ignores a critical fact: Plaintiffs had David O’Mara serving as local counsel. In Nevada, the responsibilities of local counsel are clearly defined, and encompass active responsibility to represent the client and manage the case:

(a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to this rule.

(b) The Nevada attorney of record shall be present at all motions, pre-trials, or any matters in open court unless otherwise ordered by the court.

(c) The Nevada attorney of record shall be responsible to the court...for the administration of any proceeding that is subject to this rule and for compliance with all state and local rules of practice. It is the responsibility of Nevada counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules.

1 Supreme Court Rule (“SCR”) 42(14).

2 This Rule could not be clearer: pursuant to Nevada law, Mr. O’Mara is “responsible for”
3 and must “actively participate in” the representation of Plaintiffs, *id.* at SCR 42(14)(a), Mr.
4 O’Mara is responsible to the court for the administration this action, *id.* at 14(c), (1)(a)(1), and it
5 is Mr. O’Mara’s responsibility “to ensure that the proceeding is tried and managed in accordance
6 with all applicable Nevada procedural and ethical rules.” *Id.* at 14(c).

7 Additionally, other courts have discussed some of the policy reasons for imposing a
8 significant role upon local counsel. As noted by one court:

9 Although the term ‘local counsel’ at one time may have meant less responsibility
10 on the part of attorneys so designated, it is clear to the court, and should be to
11 every lawyer who litigates in this country, that in the last ten years developments
12 in the law have invalidated this prior meaning. The trend is, properly, away from
13 the view that some counsel have only limited responsibility and represent a client
14 in court in a limited capacity, or that the local counsel is somewhat less the
15 attorney for the client than is lead counsel. In modern day practice, all counsel
16 signing pleadings and appearing in a case are fully accountable to the court and
their clients for the presentation of the case. The Federal Rules of Civil
Procedure...do not recognize any lawyers as less than full advocates for their
clients. The law makes no distinction, as to the liability of lawyers signing
pleadings, between those who are self-designated “lead” or “local” counsel.
Federal Rule of Civil Procedure 11 places stringent obligations on all counsel
signing pleadings, however designated.

17 *Gould, Inc. v. Mitsui Min. & Smelting Co.*, 738 F. Supp. 1121, 1125 (N.D. Ohio 1990); *see also*,
18 *e.g.*, *Duke Univ. v. Universal Prod. Inc.*, 2014 WL 3670019, at *2 (M.D.N.C. July 24, 2014)
19 (unpublished) (“[B]y explicitly declaring that members of the bar of this Court who appear
20 along with specially-appearing counsel remain ‘responsible to this Court for the conduct of the
21 litigation’ and by requiring said members to sign all court filings and to attend most court
22 proceedings, the Local Rules of this Court place[] an important responsibility upon the attorney
23 who sponsors a pro hac vice admission to this Court. Such attorney is not merely a ‘local
24 counsel,’ but shares full responsibility for the representation of the client. [Such] rule[s] impose[
25] a significant, ongoing responsibility on [so-called] local counsel and should not be taken
26 lightly.”).

1 Thus, Plaintiffs cannot simply disregard Mr. O'Mara when making their unsupported
2 and unfounded arguments about Mr. Moquin's failures. Even if Plaintiffs' unfounded and
3 facially deficient theories about Mr. Moquin had any truth to them, Plaintiffs tellingly offer no
4 explanation whatsoever as to why Mr. O'Mara did not fulfill his clearly-delineated duties
5 pursuant to SCR 42. Indeed, Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record
6 to the designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his
7 Motion to Associate Counsel. (On file herein). The relief that Plaintiffs seek ignores, and runs
8 afoul of, the plain language of SCR 42.

9 Further, it is also worth noting that Mr. O'Mara, in practice, did have more than a
10 perfunctory role in this case. He attended every hearing and Court conference in this case. And,
11 among other things, Mr. O'Mara signed the Verified Complaint (on file herein) and the First
12 Amended Verified Complaint (on file herein). *See also* WDCR 23(1) ("Counsel who has
13 appeared for any party shall represent that party in the case and shall be recognized by the court
14 and by all parties as having control of the client's case, until counsel withdraws, another
15 attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing
16 office, in accordance with SCR 46 and this rule."). He was the sole signatory on Plaintiffs'
17 deficient initial disclosures, (**Exhibit 6**), the uncured deficiencies of which ultimately proved to
18 be a prominent basis for dismissal. *See* Sanctions Order. Mr. O'Mara also signed and filed a
19 Motion before this Court representing that "Counsel has been diligently working for weeks to
20 respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With
21 the full intention of submitting said responses, Counsel for Plaintiffs encountered unforeseen
22 computer issues.... Counsel for Plaintiffs is confident that with a one-day extension they will be
23 able to recreate and submit the oppositions to Defendants' three motions." (December 6, 2017,
24 Motion, on file herein).

25 The fact that Plaintiffs had counsel beyond Mr. Moquin who was "responsible for" and
26 required to "actively participate in" the representation of Willard, was responsible to the court
27 for the administration of this action, and responsible "to ensure the proceeding [was] tried and
28

1 managed in accordance with all applicable Nevada procedural and ethical rules” is an
2 independent basis to deny Plaintiffs’ request for relief, which is based purely on alleged (and
3 uncorroborated and inadmissible) theories regarding Mr. Moquin.

4 **IV. CONCLUSION**

5
6 For the reasons set forth above, Defendants respectfully request that this Court enter an
7 Order denying the Rule 60(b) Motion in its entirety.

8 **AFFIRMATION**
9 **Pursuant to NRS 239B.030**

10 The undersigned does hereby affirm that the preceding document does not contain the
11 social security number of any person.

12 DATED this 18th day of May, 2018.

13 DICKINSON WRIGHT, PLLC

14
15 /s/ Brian R. Irvine
16 DICKINSON WRIGHT
17 JOHN P. DESMOND
18 Nevada Bar No. 5618
19 BRIAN R. IRVINE
20 Nevada Bar No. 7758
21 ANJALI D. WEBSTER
22 Nevada Bar No. 12515
23 100 West Liberty Street, Suite 940
24 Reno, NV 89501
25 Email: Jdesmond@dickinsonwright.com
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27 Email: Awebster@dickinsonwright.com

28 *Attorney for Defendants Berry Hinckley
Industries, and Jerry Herbst*

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **OPPOSITION TO RULE 60(b) MOTION FOR RELIEF** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER &
WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Attorneys for Plaintiffs/Counterdefendants

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3287 Ruffino Lane
San Jose, California 95148

DATED this 18th day of May, 2018.

/s/ Mina Reel
An employee of DICKINSON WRIGHT PLLC

EXHIBIT LIST

| Exhibit | Description | Pages¹¹ |
|----------------|--------------------------------------------------------------------|---------------------------|
| 1 | Declaration of Brian R. Irvine | 3 |
| 2 | Transcript of Hearing, January 10, 2017 | 69 |
| 3 | Transcript of Hearing, December 12, 2017 | 28 |
| 4 | Excerpt of deposition transcript of Larry Willard, August 21, 2015 | 8 |
| 5 | Attorney status according to the California Bar | 1 |
| 6 | Plaintiff's Initial Disclosures, December 12, 2014 | 7 |

¹¹ Exhibit page count is exclusive of exhibit slip sheet.

EXHIBIT 1

EXHIBIT 1

DICKINSON WRIGHT PLLC
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*Attorney for Defendants
 Berry Hinckley Industries and Jerry Herbst*

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as
 trustee of the Larry James Willard Trust Fund;
 OVERLAND DEVELOPMENT
 CORPORATION, a California corporation;
 EDWARD E. WOOLEY AND JUDITH A.
 WOOLEY, individually and as trustees of the
 Edward C. Wooley and Judith A. Wooley
 Intervivos Revocable Trust 2000,

CASE NO. CV14-01712
 DEPT. 6

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada
 corporation; and JERRY HERBST, an
 individual,

Defendants.

BERRY-HINCKLEY INDUSTRIES, a
 Nevada corporation; and JERRY HERBST,
 an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as
trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
CORPORATION, a California corporation;

Counter-defendants.

**DECLARATION OF BRIAN R. IRVINE IN SUPPORT OF
DEFENDANTS' OPPOSITION TO RULE 60(b) MOTION FOR RELIEF**

I, Brian R. Irvine, pursuant to NRS 53.045, declare and state as follows:

1. I am an attorney with the law firm of DICKINSON WRIGHT, PLLC, attorneys
for Defendants BERRY-HINCKLEY INDUSTRIES ("BHI") and JERRY HERBST
(collectively with BHI, "Defendants") in the above-captioned action.

2. I submit this Declaration in support of Defendants' Opposition to the Willard
Plaintiffs' Rule 60(b) Motion for Relief ("Opposition"). I have personal knowledge of the
matters set forth in this Declaration and, if called as a witness, could and would competently
testify thereto.

3. Attached to the Opposition as **Exhibit 2** is a true and correct copy of the
Transcript of Hearing, January 10, 2017.

4. Attached to the Opposition as **Exhibit 3** is a true and correct copy of the
Transcript of Hearing, December 12, 2017.

5. Attached to the Opposition as **Exhibit 4** is a true and correct copy of Excerpt of
deposition transcript of Larry Willard, August 21, 2015.

6. Attached to the Opposition as **Exhibit 5** is a true and correct copy of the attorney
status information for Brian P. Moquin from the California Bar's webpage, which I accessed
and printed on May 17, 2018.

7. Attached to the Opposition as **Exhibit 6** is a true and correct copy of Plaintiffs'
Initial Disclosures of December 12, 2014.

///

1 I declare under penalty of perjury under the law of the State of Nevada that the
2 foregoing is true and correct.

3
4 DATED this 18th day of May, 2018.

5
6 /s/ Brian R. Irvine

7 BRIAN R. IRVINE
8
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EXHIBIT 2

EXHIBIT 2

1 Code #4185

2 SUNSHINE REPORTING SERVICES
3 151 Country Estates Circle
4 Reno, Nevada 89511
5 775-323-3411

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

9 -o0o-

10 LARRY J. WILLARD, et al.,

Case No. CV14-01712

11 Plaintiffs,

Dept. 6

12 vs.

13 BERRY-HINCKLEY, et al.,

14 Defendants.
15

16 _____/

17 TRANSCRIPT OF PROCEEDINGS

18 HEARING ON MOTION FOR PARTIAL SUMMARY JUDGMENT

19 January 10, 2017

20 Reno, Nevada

21
22
23
24 REPORTED BY: CONSTANCE S. EISENBERG, CCR #142, RMR, CRR

25 Job No. 364978

1 APPEARANCES:

2 For the Plaintiffs:

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1 TUESDAY, JANUARY 10, 2017, RENO, NEVADA, 9:41 A.M.

2 -o0o-

3 THE COURT: This is the time set for oral arguments on
4 Defendants' motion for partial summary judgment in case number
5 CV14-01712, Willard, et al., versus Berry-Hinckley Industries,
6 et al.

7 Please state your appearances.

8 MR. IRVINE: Brian Irvine on behalf of defendants, and
9 with me is Anjali Webster.

10 MR. MOQUIN: Good morning, Your Honor. Brian Moquin.
11 We have the plaintiffs with cocounsel, David O'Mara. And
12 plaintiffs Larry Willard and Ed Wooley are also present.

13 THE COURT: Good morning.

14 Counsel, I have read everything, and I'm going to allow
15 you to go ahead and make your arguments.

16 I do have some specific points that I want to address,
17 but I don't want to foreclose whatever you would like to argue
18 because we have the time set aside.

19 So you may proceed.

20 MR. IRVINE: Thank you, Your Honor. We appreciate you
21 scheduling time for us to hear this motion today. And, obviously,
22 jump in and ask me whatever questions you want. I'm very flexible
23 in how I can present this, so it won't bother me.

24 Your Honor, we filed this motion for partial summary
25 judgment for a couple of purposes.

1 The most important reason is, we want to focus the
2 remaining issues in this case to allow us to streamline our
3 presentation to Your Honor in what we anticipate will be future
4 motions for summary judgment and trial in this case.

5 We want to make sure also -- second reason is that the
6 plaintiffs, if they prevail in this case, get what they contracted
7 for and nothing else, because a reading of the operative pleading,
8 the first amended complaint in this case, shows that the
9 plaintiffs are seeking unforeseeable, remote and overreaching
10 damages that they are not entitled to as a matter of settled
11 Nevada law, specifically, well beyond the more than \$20 million in
12 cumulative damages for future rent sought by the plaintiffs.

13 The plaintiffs are also seeking multimillions of dollars
14 in damages for purported losses that don't result directly from
15 any breach by the defendants and which are not foreseeable to the
16 parties at the time the leases were executed.

17 Specifically, looking at the first verified amended
18 complaint -- and, Your Honor, I'll be referring to two sets of
19 plaintiffs here today.

20 We've got the Willard plaintiffs, which are Mr. Willard
21 and his company, Overland, and the Wooley plaintiffs, which are
22 Mr. Wooley and his wife and an entity there as well.

23 So with respect to the Willard plaintiffs, if you look
24 at the first amended complaint, we've got the rent damages they
25 are seeking in paragraph 14.

1 And then at paragraph 15, we've got what I'll refer to
2 as the short sale damages, which Mr. Willard is claiming as a
3 result of being forced to sell the property located at Longley and
4 South Virginia Streets following a threatened foreclosure by the
5 lender.

6 Specifically, they are seeking about 4.4, \$4 million in
7 earnest money that the Willard plaintiffs claim they invested in
8 that property.

9 They are also claiming at least \$3 million in tax
10 consequences and \$550,000, roughly, in closing costs. And those
11 are all in paragraph 15 of the first amended complaint.

12 THE COURT: But the amounts really don't matter,
13 correct? I mean, it's the principal that matters.

14 MR. IRVINE: That's correct, Your Honor. I'm just
15 trying to be specific as to what we're going to ask for. But you
16 are right, the amounts don't matter.

17 So I'll call those the closing -- excuse me, the short
18 sale damages for the Willard plaintiffs.

19 The other category of damages that the Willard
20 plaintiffs are seeking are what I'll call the attorney's fees
21 damages.

22 And these are damages that the Willard plaintiffs are
23 seeking for two purposes.

24 Firstly, as a result of the threatened foreclosure
25 proceedings by their lender, Mr. Willard voluntarily filed for

1 Chapter 11 protection down in Northern California.

2 He later dismissed that bankruptcy voluntarily after he
3 was unable to, apparently, renegotiate with the bank. But they
4 are seeking all their fees and costs associated with that
5 bankruptcy filing, which was voluntarily dismissed.

6 They are also seeking fees as damages here, not as
7 attorney's fees as a prevailing party in this case, but as
8 damages, the fees and costs that they incurred filing their
9 original complaint in state court in Northern California.

10 That case was also dismissed by the Court. And we've
11 got some exhibits in there that show that the case was pretty
12 wildly overreaching with respect to not the only damages that were
13 sought, but the parties that were named as defendants.

14 So I'll call those the attorney's fees damages.

15 Those are actually common to both the Willard and Wooley
16 plaintiffs with respect to the California state court action. The
17 bankruptcy court piece is unique to Mr. Willard.

18 Then with respect to Mr. Wooley, the other category of
19 damages I'll be discussing today are the damages that they claim
20 they incurred as a result of having to sell the Baring Boulevard
21 property in Sparks, because, allegedly, the Baring Boulevard
22 property and the Highway 50 property, which is actually at issue
23 in this case, were cross-collateralized on the loan, meaning that
24 if they defaulted under one, both were security for the note.

25 And so Mr. Wooley has indicated that he was forced to

1 sell the Baring Boulevard property in order to cure his default on
2 the Highway 50 loan and lose -- and avoid losing that property.

3 He's claiming that as a damage in this case, even though
4 the Baring Boulevard property was not operated by my client at the
5 time he sold it.

6 We -- as we set forth in our motion, we believe that all
7 of these damages are precluded under Nevada law on consequential
8 damages.

9 You have to look to when the contracts were formed to
10 determine whether the damages were foreseeable as a matter of law.
11 And you also have to look as to whether plaintiffs actually
12 incurred some of these damages.

13 As we briefed this, some of the short sale damages that
14 the Willard plaintiffs are claiming, they have never paid those.
15 They have never written a check, never actually been financially
16 harmed.

17 And we can get to that, but that's another reason for
18 this Court deciding that those damages are inappropriate.

19 THE COURT: Is there dispute as to whether they were
20 paid or not?

21 MR. IRVINE: I think there may be as to the closing
22 costs. I think the plaintiffs have certainly conceded that they
23 never paid any taxes as a result of forgiven debt income from the
24 short sale.

25 They never paid those taxes. They are claiming an

1 additional type of damage out of that now.

2 But it's very clear under Nevada law -- and I'm citing
3 to the Hilton Hotels case, and I'll quote. "The damages are not
4 recoverable for loss that the party in breach did not have reason
5 to foresee as a probable result of the breach when the contract
6 was made."

7 And the Hilton case cites with approval, the restatement
8 second of contracts at Section 351, which further defines
9 "foreseeability."

10 It says "Damages are not recoverable for loss that the
11 party in breach did not have reason to foresee as a probable
12 result of the breach when the contract was made."

13 It says, number two, "Loss may be foreseeable as a
14 probable result of a breach because it follows from the breach, A,
15 in the ordinary course of events; or B, as a result of special
16 circumstances beyond the ordinary course of events that the party
17 in breach had reason to know."

18 THE COURT: But doesn't the Hilton case really cut both
19 ways for you, because the Court there found that the trial court
20 erred by not submitting a third claim -- that was the loss of
21 profits claim -- to the jury?

22 MR. IRVINE: Well, there is -- foreseeability, to be
23 sure, Your Honor, is usually a question of fact. But here, we
24 think that all the discovery that's necessary has been completed
25 for this Court to determine these as a matter of law.

1 THE COURT: So you would distinguish that portion of
2 that case?

3 MR. IRVINE: And that's the reason, Your Honor, because
4 that usually is a question of fact.

5 We did all the discovery we wanted to do on this. We
6 filed our motion. Plaintiffs opposed the motion. They didn't do
7 so under Rule 56(f). They haven't taken a position that they need
8 additional facts for this Court to decide.

9 So we would submit that it's appropriate for this Court
10 to decide these issues on foreseeability as a matter of law at
11 this point in the case.

12 THE COURT: And wasn't the supplement unopposed?
13 Essentially, the additional information that you provided the
14 Court, there was no opposition or any additional information
15 provided by plaintiffs?

16 MR. IRVINE: That's correct, Your Honor. There was no
17 response to that.

18 And by way of background, if it wasn't clear, we did
19 that supplement because of some information that came later in the
20 case after the briefing. And so we felt it would be appropriate
21 for Your Honor to see what our expert had to say on the tax
22 damages.

23 And there's been no rebuttal report disclosed to
24 Ms. Salazar either, Your Honor. And the deadline for that has
25 run, just so you know that.

1 THE COURT: Okay.

2 MR. IRVINE: So, getting back to where -- I left off
3 with the restatement.

4 So there are two ways that something can be foreseeable.
5 It can be a damage that flows in the ordinary course of events,
6 something you would expect for this type of breach in all cases,
7 or the breaching party had some special knowledge about the
8 consequences of a possible breach.

9 And neither of those are met for any of the categories
10 of damages we've identified. And the burden of proving
11 foreseeability is on the plaintiff, as it is in all cases for
12 damages.

13 So I would like to start with Mr. Willard's damages and
14 the Willard plaintiffs' damages.

15 Specifically, I'll start with the short sale damages.
16 And we've cited a number of cases about this, which all say the
17 same thing.

18 We've got the Margolese case from the Ninth Circuit. We
19 have the Enak Realty case from the Supreme Court of New York. And
20 we have -- sorry. And we have the Boise joint venture case from
21 the Court of Appeals of Oregon, all which say the same thing,
22 which says, in the case of a lease -- and I'm quoting from
23 Margolese.

24 "In the case of a lessee, the lessee generally does not
25 expect that the lessor will lose his property if the lease is

1 breached. Rather, a lessee would expect to be liable for lost
2 rent and any physical damage to the premises."

3 All three of those cases hold the same thing and we
4 would submit that that's the case here.

5 Otherwise, if the Court were to hold that a commercial
6 lessee assumes, essentially, the debt of the landlord, then he
7 might as well set the lease aside and call the lessee a guarantor,
8 because, really, they are signing up to pay the rent.

9 And in this case, the Willard plaintiffs are asking them
10 not only to be responsible for rent, which is a very high amount,
11 \$15 million plus, they are also asking them to, essentially, be
12 responsible for the debt service that the landlord is obligated
13 to.

14 So we would submit that under the first prong of the
15 restatement with respect to the short sale damages, the
16 foreclosure on the property and the following short sale are not
17 something that's foreseeable in the ordinary course when you
18 breach a lease.

19 We would also submit that there was no actual special
20 knowledge that defendants had at the time the parties entered into
21 the contracts that it was probable that Willard would have the
22 property foreclosed upon if the tenants stopped paying rent.

23 And this really goes to the summary judgment standard,
24 Your Honor.

25 We provided an affidavit from Tim Herbst that

1 demonstrated that BHI had no reason to believe at the time the
2 Willard lease was executed that a breach of that lease by BHI
3 could force Willard to sell the property, incur tax consequences,
4 closing costs, or lost earnest money.

5 We shifted the burden to the plaintiffs with the
6 evidence that we produced as part of our motion. And the Willard
7 plaintiffs didn't offer any evidence to contradict what Mr. Herbst
8 said. So summary judgment should be granted under Rule 56(e).

9 In fact, not only did they not contradict it, they
10 agreed with Mr. Herbst.

11 If you look at Mr. Willard's deposition testimony, which
12 we attached as Exhibit 6 to our motion, pages 117 to 119, he
13 testified that he only spoke to Tim Herbst several years after the
14 execution of the Willard lease. The Willard lease was executed in
15 2005.

16 Mr. Willard testified that he had discussions with the
17 Herbst family in 2008 and, again, in 2012 about the problems that
18 it would cause if the Herbst family breached the lease.

19 But those discussions don't impose any special knowledge
20 upon the defendants here, because you have to look at the time the
21 lease was formed.

22 And there's no question, it's undisputed that all of
23 these conversations about the consequences of a breach took place
24 three years, maybe even as much as six or seven years after the
25 lease was executed.

1 And you can't do that. You have to look at
2 foreseeability at the time the lease was signed, because that's
3 the time when the -- when the tenant has the opportunity to say
4 wait a minute, what kind of liability am I going to assume here.

5 That's the chance they have to not assume that
6 liability. After the lease is signed, it's a done deal. So
7 that's when you have to look at foreseeability.

8 The only evidence that plaintiffs provided that the
9 short sale damages might have been foreseeable to the tenants is
10 the subordination agreement that they attached to their opposition
11 as Exhibit 32, which they claim put the tenant on notice that a
12 breach could result in a foreclosure, short sale, default, all
13 that kind of stuff.

14 But if we look at the subordination agreement, that
15 argument really doesn't hold water. The subordination agreement
16 in Exhibit 32 was executed on February 21st, 2006. Again, we're
17 looking at about three months after the lease was executed.

18 And it was recorded on February 24th, 2006.

19 So, again, this was signed by the tenant several months
20 after the lease was executed and has no bearing on foreseeability.

21 In addition, it's important to note that this really
22 would only put the tenant, at best, on notice that there was
23 financing in place. It doesn't say anywhere in here that there
24 would be a foreclosure if the lease was breached.

25 And thirdly, this subordination agreement shows that the

1 lender is an entity known as South Valley National Bank.

2 Well, that's not the loan that the Willard plaintiffs
3 defaulted under, and that's not the loan that was eventually
4 foreclosed upon or was satisfied by a short sale.

5 That's a different loan. That's the loan with a bank
6 called Telesis.

7 And if you look at Exhibit 33, you'll see that that's
8 the case, that a deed of trust was executed in favor of Telesis
9 Community Credit Union in March of 2006.

10 And there's no evidence that this was given to the
11 Herbsts, and it doesn't matter because it's several months after
12 the lease was executed.

13 So the plaintiffs didn't even breach the loan that they
14 provided to the tenants as part of the subordination agreement.

15 The next argument that the plaintiffs used in their
16 opposition was to cite to a number of lease provisions to try to
17 get around the requirement that all damages under Nevada law have
18 to be foreseeable.

19 And this is at the opposition at page 14 where they run
20 through a number of lease provisions and try to say that these
21 lease provisions somehow eliminate the foreseeability requirement
22 or help them meet it.

23 I'm sorry, Your Honor, bear with me one moment.

24 But, Your Honor, I would submit that all the provisions
25 that the plaintiffs cite in this section, which starts at page 14,

1 don't do anything to obviate the foreseeability requirement.

2 The first provision that the plaintiffs cite there is
3 Section 4-D of the lease, which talks about rent.

4 This is a provision that details the tenants' obligation
5 to pay rent. It's entitled "Rental and Monetary Obligations."
6 And sure, it says that the landlord is entitled to rent and the
7 tenant has to pay it.

8 It doesn't say anything about foreclosure. It doesn't
9 say anything about short sales.

10 THE COURT: What about the term "monetary obligations"?

11 MR. IRVINE: Well, sure, yeah. The plaintiffs have
12 monetary -- excuse me. The tenant has monetary obligations to pay
13 rent certainly, and it's a triple net lease. They have the
14 obligations to pay taxes, they have the obligations to pay
15 utilities and everything else that goes with that.

16 But in order for this to get around the foreseeability
17 requirement, it would certainly have to say more than, hey,
18 tenant, you owe money under this lease.

19 It doesn't say anything about damages that were caused
20 by the breach of the loan that the plaintiffs had.

21 Same thing holds true for Section 8 of the lease, which
22 is addressed later there. This is the section on taxes and
23 assessments and also goes with the triple net nature of the lease.

24 And we won't dispute that it certainly says that the
25 tenant has the obligation to pay 100 percent of the taxes on the

1 property during the lease term. We're not disputing that.

2 And if they had a claim that we hadn't paid some kind of
3 tax damage, we wouldn't be here.

4 This provision doesn't say anything, again, about
5 financing. It doesn't say anything about foreclosures. It
6 doesn't say anything at all about the damages that the Willard
7 plaintiffs are seeking here.

8 THE COURT: So your position is although they claim tax
9 consequences, it's simply something different than what is
10 intended by Section 8?

11 MR. IRVINE: Absolutely. Absolutely.

12 This says -- this says that the lessee shall pay -- and
13 I'm paraphrasing a bit here --

14 THE COURT: I have it right here in front of me.

15 MR. IRVINE: -- "all taxes and assessments of every type
16 and nature assessed against or imposed upon the property or the
17 lessee."

18 The taxes that the Willard plaintiffs are seeking are
19 personal income taxes to both Mr. Willard and to Overland. This
20 doesn't address anything or impose any obligation upon the tenant
21 to pay the personal income taxes of any of the plaintiffs.

22 Willard plaintiffs also cite to Section 15 of the lease,
23 which is the indemnification provision. And I wanted to spend a
24 minute on this because I think this is an interesting area.

25 The plaintiffs are claiming that the indemnification

1 provision somehow gives them rights for direct damages from my
2 clients for the breach of the lease.

3 But that's not what indemnity is. Indemnity is there to
4 serve against -- to serve to defend plaintiffs for claims that are
5 brought against -- brought by third parties for actions that my
6 client took or failed to take.

7 The best example might be taxes. For instance, if we
8 didn't pay the property taxes on the property for the first
9 quarter of 2012, and the County came after the plaintiffs, they
10 would have indemnity from us from that claim against
11 Washoe County.

12 That doesn't give them any additional rights against us
13 for direct liability.

14 And that's what both the Boise joint venture case, which
15 we cite on page 11 of our reply, the Pacificorp v. SimplexGrinnell
16 case from Oregon, and the May Department Store case from the
17 Colorado Court of Appeals all say.

18 "Indemnity clauses are intended to protect parties
19 against claims made by third parties and do not apply to actions
20 between the contracting parties directly."

21 Same thing with the May case. I'll quote, "Generally
22 indemnity language is construed to apply only to claims asserted
23 by third parties against the indemnitee, not to claims based upon
24 injuries or damages suffered directly by that party."

25 So, again, this indemnification provision doesn't give

1 them any additional rights under this contract. This would give
2 them the right to a defense from us against claims made by third
3 parties.

4 And I would submit that they are simply misconstruing
5 the effect of the indemnity provision.

6 Moving on, Your Honor, to the tax consequence damages
7 specifically, we -- damages in this case, frankly, have been a bit
8 of a moving target.

9 I read to you from the first amended complaint. We've
10 never received a specific damages computation from any of the
11 plaintiffs in this case under 16.1, as they are required to do,
12 despite multiple demands from us.

13 We've done some written discovery and deposition
14 discovery from them on their damages, specifically about the tax
15 damages. And we were always told that it was income from debt
16 forgiveness.

17 But then in the opposition, we learn for the first time
18 that they never actually paid the debt forgiveness income. We
19 raised that in the brief, and we said, hey, we don't have any
20 evidence you paid this.

21 On page 10 of their opposition, the Willard plaintiffs
22 conceded that they didn't claim any tax damages.

23 They say, since the Willard plaintiffs' respective total
24 debt was greater than their respective total assets, these tax
25 liabilities were not reported as income and are consequently no

1 longer being claimed as damages.

2 But then they change their position for the first time
3 in this opposition and say that the damages they are now seeking
4 are what they call capital loss carryovers that they have been
5 carrying as an asset.

6 Well, we would submit that capital loss carryovers are
7 even more remote and more attenuated than debt forgiveness income.

8 And we certainly, the plaintiffs -- excuse me. The
9 tenant certainly had no reason to know what the accounting
10 circumstances were for the Willard plaintiffs and that they were
11 carrying these capital loss carryovers.

12 And in addition, as we put forth in our supplement,
13 these aren't a dollar-for-dollar damage anyway. These would have
14 to be multiplied by the applicable tax rate to arrive at
15 plaintiffs' actual loss benefit.

16 But it doesn't matter because these are completely
17 unforeseeable, and there's no chance that any of the tenants had
18 special knowledge that would put them on notice that plaintiffs
19 were carrying these on their books and would lose them as the
20 result of a breach of the lease as result of the foreclosure.

21 I mean, there's multiple steps in between that cancel
22 out the foreseeability here.

23 With respect to the earnest money component of the short
24 sale damages, again, none of the lease provisions we've looked at
25 remotely contemplate the tenants having to pay the landlords back

1 for their initial investment in the property. It's categorically
2 unreasonable to require a tenant to be responsible for that.

3 I mean, Your Honor, I would submit that you could look
4 at the hypothetical residential lease where a family rents a
5 property and that's where they are going to live. Someone loses
6 their job and they can't pay the rent on the property they are
7 renting anymore.

8 Then all of a sudden, they are responsible for all the
9 landlord's financing damages? It just doesn't make sense. It's a
10 slippery slope that we can't go down.

11 It's also directly contradicted by the Margolese case.
12 In that case, the plaintiffs were seeking to recover -- and I'm at
13 page 1 here.

14 Plaintiffs/appellants brought the action for lost
15 rentals, cost of tenant improvements and their lost equity in the
16 property, which I submit is the same as lost earnest money.

17 And the Court held that because they are just a general
18 lessee, there's no expectation that the lessor would lose his
19 property if the lease were breached and the lessee's liability is
20 limited to the lost rent and physical damages to the premises.

21 And I would say there's no reason to depart from that
22 here based upon the evidence before the Court.

23 Finally, with respect to the closing costs component of
24 the short sale damages, I won't repeat the foreseeability part of
25 this. Again, it's not anywhere contemplated in the lease.

1 There's no special knowledge about that.

2 This one is interesting because there's no evidence that
3 Willard actually paid any closing costs with respect to that short
4 sale.

5 The closing statement, which the Willard plaintiffs
6 disclosed in discovery and which is attached to our motion as
7 Exhibit 9, simply shows that all of the proceeds from the short
8 sale went to the lender and that the closing costs that were
9 incurred simply went to reduce the amount of money that the lender
10 received, which increased the amount of debt forgiveness that the
11 Willard plaintiffs received.

12 And they are not claiming damages for that debt
13 forgiveness income anymore.

14 So it's not as if Willard wrote a check here. He's not
15 out of pocket for any of these closing costs. Certainly, no
16 evidence to the contrary has been produced. The closing costs
17 only impacted how much Willard lenders would receive in the payoff
18 from that purchase price.

19 I think that's what I have with respect to the short
20 sale damages, Your Honor, if you have any questions on any of
21 that.

22 THE COURT: No. I addressed it with regard to Hilton.
23 I wanted to ask that very question. You can move on to attorney's
24 fees.

25 MR. IRVINE: I'm going to actually do attorney's fees

1 last because that's common to both of the plaintiffs. So I'll
2 skip over to Mr. Wooley's claim for damages on the
3 Baring Boulevard cross-collateralization now.

4 That's a tough word.

5 Again, we're looking at the same law on foreseeability.
6 And the leases in play here, Your Honor, are, if not identical,
7 then 99 percent identical.

8 So the provisions that the plaintiffs have cited in
9 their opposition brief about indemnity and the taxes and the
10 monetary obligations and all of that, I won't repeat those
11 arguments with respect to Baring because they apply to both.

12 But it's clear that the Wooley lease was executed in
13 December of 2005. That's Exhibit 10 to our brief. And it's also
14 clear that when that lease was executed, the Wooley plaintiffs did
15 not own the Baring Boulevard property.

16 The Baring purchase was executed about six months later.
17 That was in, I believe, May of 2006. And I think that's
18 Exhibits 13 and 14 to the opposition brief.

19 Yes, that's -- let's see here. Yes, that's the lease
20 and the guarantee for the Baring Boulevard property, which are
21 both dated later in time.

22 And the deed of trust on that property and the note and
23 the purchase and sale agreement are all attached to the opposition
24 as well.

25 But it's undisputed that the Baring property was not

1 owned at the time of the Highway 50 lease, which is subject to
2 this case, was executed.

3 And it's undisputed that there's no way that the tenants
4 could have known about any cross-collateralization provisions
5 between the two parties when they signed the lease because they
6 didn't own Baring yet, didn't have financing on Baring yet. So
7 there couldn't have been any cross-collateralization for them to
8 be aware of.

9 There's certainly nothing in the lease that references
10 cross-collateralization with another property, certainly nothing
11 in there that says that if you breach the Highway 50 lease, that
12 the Wooley plaintiffs are going to be forced to sell an unrelated
13 property at a loss, which would cause them to incur liabilities.

14 Because foreseeability is measured at the time of
15 entering into the contract, this precludes Wooley from claiming
16 foreseeability as a matter of law.

17 And, Your Honor, I think a little background here would
18 be helpful as well.

19 The first complaint in this case, the Wooley plaintiffs
20 actually sought direct damages for breach of the lease on Baring.
21 And we had to point out to them that we were no longer operating
22 Baring and that it had been sold to Jackson's food stores and that
23 Jackson's was fully performing.

24 It took a few months, but they eventually conceded that
25 position and came up with this new damages model to try to get

1 another \$600,000 for the loss on Baring, plus some tax damages.

2 And, again, we submitted the affidavit of Tim Herbst,
3 saying that BHI had no knowledge of any of this
4 cross-collateralization or financing consequences with respect to
5 Highway 50 breach having an effect on Baring. His affidavit is
6 pretty clear.

7 And, again, under Rule 56, the burden shifted to the
8 plaintiff to come up with affirmative evidence, including
9 affidavits contradicting Mr. Herbst. They weren't able to do
10 that.

11 In fact, Mr. Wooley in his deposition admits -- I'm at
12 pages 119 and 120 of his deposition. He admits that he didn't
13 discuss any of that with any of the Herbst family and that they
14 had no reason to know about it.

15 So I would submit for all of those reasons the Baring
16 property damages from the cross-collateralization and the forced
17 sale of that property, none of that was foreseeable as a matter of
18 law.

19 Nothing -- it's not discussed in the lease. It's not a
20 natural consequence of a breach of a lease, and there was no
21 special knowledge that the Herbst parties had that would impose
22 liability on them.

23 With respect to the attorney's fees damages, I'll start
24 with the California action because it's common to both the Willard
25 and Wooley plaintiffs.

1 They are claiming that they had to hire an attorney to
2 file suit against BHI and Herbst in Santa Clara County and
3 incurred \$35,000 roughly in attorney's fees.

4 Well, Your Honor, the lease -- both leases, in fact,
5 have a pretty clear venue and choice of law provision that
6 requires lawsuits to be filed here in Nevada, not in California.

7 The California case, as I said before, included a number
8 of parties that were in no way related to this case.

9 We attached a docket sheet, Your Honor, and a motion to
10 dismiss at Exhibits 4 and 5 to our motion respectively. And
11 you'll see, if you look at those, that in that case, they named
12 Jerry Herbst's wife Mary Ann, who had nothing to do with the
13 transaction between these parties; named Timothy Herbst, who,
14 again, had no -- didn't sign a guarantee or anything else.

15 They named Terrible Herbst's, Inc. They named some
16 financial consultants, Mark Berger, Crossroad Solutions Group.
17 They named Union Bank, who is the successor in interest to
18 Santa Barbara Bank.

19 There was significant motion practice over in the
20 California court having to do not only with jurisdiction and
21 venue, but also just that there were no viable claims against any
22 of these parties.

23 The California court eventually dismissed that case and
24 it was brought here.

25 Well, we think that these fees are not recoverable by

1 the plaintiffs in this action as damages for a number of reasons.

2 Firstly, they are not -- they are not special damages.

3 The Christopher Homes case is the most comprehensive case the
4 Nevada Supreme Court has on this issue. That's from 2014.

5 And it clarifies what was, I guess, kind of a mess that
6 we had with the other previous cases, the Horgan case and the
7 Sandy Valley Associates case.

8 But after the Christopher Homes v. Liu case, it's pretty
9 clear that special damages -- attorney's fees can only be
10 recovered as special damages in limited circumstances.

11 The first one is cases concerning title to real
12 property, slander of title actions. You can get attorney's fees
13 as special damages if you are suing to remove a cloud on title.
14 That, obviously, doesn't apply here.

15 Or a party to a contract can seek to recover from a
16 breaching party the fees that arise from the breach that caused
17 the nonbreaching party to accrue attorney's fees in defending
18 against a third party's legal action.

19 This was pretty similar to what I was arguing on the
20 indemnity provision earlier. You can only get attorney's fees as
21 special damages if somebody else sues you and you have to defend
22 that. You can go back to the party you have a contract with and
23 try to get your attorney's fees back from them.

24 And that would be, you know, fairly similar to an
25 indemnification case. The example I used with Washoe County is

1 probably somewhat still good, although they probably wouldn't sue,
2 but it's very similar to an indemnity.

3 And it's simply not one of the circumstances here that
4 the Court contemplated in the Christopher Homes case.

5 Here, we've got plaintiffs making a deliberate choice to
6 go sue in the wrong forum. They sued the wrong defendants, and
7 their case was dismissed. And under the law, those aren't special
8 damages that we have to pay for here.

9 We don't think that they would be recoverable --
10 assuming the plaintiffs someday prevail in this case, we don't
11 think they would be recoverable as a prevailing party under the
12 contract either.

13 We think, frankly, that the California court would be
14 the proper forum to award those damages in the first place, not
15 this court.

16 But because they don't meet the test in
17 Christopher Homes, you don't really have to get there. They are
18 simply not special damages and both plaintiffs should be precluded
19 from seeking them in this case.

20 And then, finally, Your Honor, my last piece is the
21 bankruptcy damages that are unique to the Willard plaintiffs.

22 Again, Mr. Willard filed for personal bankruptcy over in
23 California. He testified specifically that he did that to try to
24 stop the foreclosure and to renegotiate with the bank.

25 That was unsuccessful. The bankruptcy was voluntarily

1 dismissed by Mr. Willard.

2 There's certainly, again, no way that that bankruptcy
3 was somehow foreseeable under the provisions of the Willard lease.
4 My client certainly had no special knowledge of that.

5 Mr. Willard expressly admits that the defendants had no
6 special knowledge of that. At his deposition, Exhibit 6 to the
7 motion at page 115, he says that he never had discussions with BHI
8 or Jerry Herbst about the possibility of filing bankruptcy, should
9 rent on the property stop being paid.

10 So with that, Your Honor, we would submit that these
11 categories of damages, the short sale damages for the Willard
12 plaintiffs, the attorney's fees for the California action for both
13 plaintiffs, the cross-collateralization damages for the Baring
14 property for the Wooley plaintiffs, and the bankruptcy damages for
15 the Willard plaintiffs are all precluded as a matter of law under
16 Nevada law on consequential damages and the requirement that such
17 damages be foreseeable at the time of the execution of the
18 contracts.

19 THE COURT: Counsel, is it sufficient where the lease is
20 signed by one principal, Berry-Hinckley, but your affidavit is
21 signed by the treasurer --

22 MR. IRVINE: Uh-huh.

23 THE COURT: Is that sufficient to establish -- because
24 you shift the burden to the plaintiffs, is that sufficient to
25 establish those facts? They are all based on information and

1 belief?

2 MR. IRVINE: They are, Your Honor. And frankly, that's
3 probably the best we could do. We would submit that we shifted
4 the burden and they didn't come back.

5 Mr. Herbst talked to his father. He investigated it.
6 And as a corporate representative of Berry-Hinckley, who is the
7 lessee under the lease, he said that there was nothing that they
8 knew as a corporation when the lease was executed that would lead
9 them to believe that any of these damages would be a consequence
10 of a breach.

11 THE COURT: And going back to the Margoese case --

12 MR. IRVINE: Yes.

13 THE COURT: -- now, you are arguing that that's
14 factually persuasive, correct, that -- or binding?

15 MR. IRVINE: Well, I don't think it's binding on this
16 Court, no, Your Honor. This is -- it's an unpublished
17 Ninth Circuit disposition for a judge I used to clerk for, which I
18 didn't realize until I read it last night, but Judge Brunetti.

19 But, no, it's not binding on this Court. We certainly
20 aren't taking that position. Frankly, there's not that much
21 law --

22 THE COURT: Right.

23 MR. IRVINE: -- on this type of factual scenario. So we
24 found what we could for you.

25 I did note in that case, it is factually persuasive

1 because that plaintiff -- actually, it's not a plaintiff, it's a
2 defendant and third-party plaintiff, was seeking as part of their
3 damages their lost equity in the property, which is what
4 Mr. Willard and Overland are seeking by way of their lost earnest
5 money claim here.

6 And that was precluded by the Margolese court, so I
7 thought it was factually similar. That's why we cited it.

8 THE COURT: At the end of the day, I mean, you are
9 really taking the position that the damages that are allowable
10 under 20-B, correct, Section 20-B of the lease?

11 MR. IRVINE: 20-B of the lease is the remedies
12 provision, yes.

13 THE COURT: And that they should be restricted to that?

14 MR. IRVINE: Yes, yes. The lease, as they have noted in
15 their opposition papers -- these leases, I should say, because
16 they both have 20-B in common, have broad remedies for the
17 landlord in the case of a breach.

18 THE COURT: But not as broad as they have asserted?

19 MR. IRVINE: No, you still have -- no matter what the
20 contract says, you still have to determine whether the damages
21 that are being sought are foreseeable. That's a fundamental
22 premise.

23 And, you know, we cited law going back to the 1800s in
24 our reply brief on this because that's how far it goes back.

25 And really, unless the lease specifically provides for

1 these type of damages, then you have to do the normal Hilton
2 restatement foreseeability test to see if these damages flow in
3 the ordinary course, number one, or if the tenant had some kind of
4 special knowledge that would put them on notice that the
5 consequences are foreseeable.

6 And neither of those are in play here.

7 In fact, the plaintiffs cited in their opposition, the
8 Gilman case, which is the family law divorce case, which I thought
9 was interesting. I hadn't found that case in my research.

10 But it says at -- I'll give you the Nevada cite -- at
11 page 426, that when parties to a contract foresee a condition
12 which may develop and provide in their contract a remedy for the
13 happening of that condition, the presumption is that the parties
14 intended the prescribed remedy as the sole remedy for that
15 condition.

16 And, Your Honor, I would submit that the parties here
17 did just that with paragraph 20-B. It's a comprehensive remedies
18 provision that allows the plaintiffs a lot of different options to
19 seek recovery against their tenant in the event of a breach.

20 And we would ask that they be held to the four corners
21 of the agreement on that and not the unforeseeable damages that
22 we're addressing here today.

23 THE COURT: All right. Thank you, Counsel.

24 MR. IRVINE: Thank you, Your Honor.

25 THE COURT: Who will be arguing?

1 MR. MOQUIN: Brian Moquin, Your Honor. I apologize, I'm
2 getting over the flu, so I'll try to keep my --

3 THE COURT: Many people have had it recently. If you
4 need water, it's there.

5 MR. MOQUIN: Thank you, Your Honor.

6 I appreciate the opportunity to present argument.

7 First -- and, I guess, going in reverse order might be
8 the simplest.

9 With respect to the last point that was just raised,
10 20-B is not the sole source of remedy provision in the lease.

11 If you look at page 18 of the lease, which in our
12 opposition is Exhibit 2, 2-18, at the bottom, it says "All powers
13 and remedies given by this section to lessor subject to applicable
14 law shall be cumulative and not exclusive of one another or if any
15 other right or remedy or any other powers of remedy is available
16 to lessor under this lease." Okay?

17 So our argument is that although it is true that
18 Section 20-B is quite broad, it is not the exclusive section with
19 respect to remedies. It is the liquidated damages section for
20 sure, but Section 15 also applies.

21 And I think it's a moot point whether or not
22 indemnification, which is Section 15, would apply to first-party
23 claims, because the vast majority in effect now, all of the claims
24 that are flowing under that provision are third party. They are
25 not direct first-party claims.

1 All the other claims, for example, attorney's fees, fall
2 out of 20-B not under indemnification.

3 But the indemnification clause is quite broad. And what
4 it does, and the way that I've structured our opposition, was not
5 to say that Section 4-B and Section 8 provide any kind of
6 remedies, it was to establish definitions of terms that were used
7 later on.

8 But it gives rise to reimbursement for any and all
9 losses caused by, incurred or resulting from, among other things,
10 breach of, default under, or failure to perform any term or
11 provision of this lease by lessee, which is clearly the case here.

12 If we look at the definition of "losses," it, too, is
13 quite comprehensive. That is found on page 32 of Exhibit 2.
14 "Losses" means "any and all claims, suits, liabilities, actions,
15 proceedings, obligations, debts, damages, losses, costs,
16 diminutions in value, fines, penalties, interest, charges, fees,
17 judgments, awards, amounts paid in settlement, and damages of
18 whatever kind or nature that are incurred."

19 I can hardly imagine a more comprehensive list of
20 damages.

21 So just broadly speaking, with respect to this
22 foreseeability issue, our argument is that, in fact, the parties
23 did contract, and the types of damages that we're discussing here
24 were contemplated because they are expressly provided for in terms
25 of the damages that are recoverable.

1 THE COURT: So your position is that this definition of
2 "losses" is so broad that it encompasses these additional damages,
3 and that, actually, because it does, you do not have to apply a
4 foreseeability test?

5 MR. MOQUIN: Well, that's not 100 percent accurate, but
6 it's close.

7 The term "any and all" has been held to apply to
8 virtually everything except for negligence of the person that's
9 being indemnified. And the Nevada law is pretty clear that that
10 is not the case.

11 But with respect to everything else, the Court is
12 obliged to -- there's no ambiguity in terms of the language of the
13 indemnification clause to read the plain language of the
14 indemnification clause entry as it is, as it is written.

15 THE COURT: So if you look at these damages as a whole,
16 and when I was analyzing the moving papers and the opposition and
17 reply, and if you go one by one, does the fact that there really
18 was a volitional act on the part of the plaintiff, in any way --
19 for instance, tax consequences resulting from cancelled mortgage
20 debt.

21 For instance, the fact that there's -- this language
22 doesn't exactly apply in a contract, but the concept does, and
23 that is this, that if the plaintiff took an act, for instance,
24 declaring bankruptcy --

25 MR. MOQUIN: Uh-huh.

1 THE COURT: -- does that obviate any kind of obligation
2 for those damages, because, in other words, they are kind of
3 creating their damages.

4 MR. MOQUIN: The only thing I can think that would fit
5 into that would be attorney's fees and bankruptcy filing fees. Is
6 that what you are referring to?

7 THE COURT: Well, the point is that they didn't have to
8 declare bankruptcy necessarily.

9 MR. MOQUIN: Okay. Well, this --

10 THE COURT: So if he took an act, isn't he really
11 creating damages?

12 MR. MOQUIN: No, he was trying to mitigate.

13 THE COURT: Okay.

14 MR. MOQUIN: And if you look at 20-B page 2, Exhibit 2,
15 page 18, the numbers here are strange, but 20-B Section 5, lower
16 case B in the middle of page 18 states, under the liquidated
17 damages provision that the lessors would be able to recover from
18 lessee "all costs paid or incurred by lessor as a result of such
19 breach, regardless of whether or not legal proceedings are
20 actually commenced."

21 Now, the definition of "costs" is important. And that,
22 again, is in the appendix to the lease, which is on page 30 --

23 THE COURT: -6.

24 MR. MOQUIN: 36.

25 Well, actually, "Cost" is defined on page 29.

1 THE COURT: Great.

2 MR. MOQUIN: Means "All reasonable costs and expenses
3 incurred by a person, including without limitation" -- "without
4 limitation, reasonable attorney's fees and expenses, court costs,
5 expert witness fees," and so forth.

6 THE COURT: And you don't think that that's restricted
7 to the relationship -- the contracting parties' relationship, but
8 that it encompasses any and all fees and expenses that could be
9 paid to any lawyer for --

10 MR. MOQUIN: Arising out of the breach.

11 And I don't think there's any disputing that the sole
12 reason that my predecessor, Mr. Goldblatt, was engaged was because
13 of this breach.

14 And he chose to file in Santa Clara County, California.
15 That was a year before I came on board.

16 With respect to the disposition of that matter, what had
17 happened is Mr. Goldblatt was in a serious auto accident, was in
18 ICU at Stanford for several weeks, and I was approached and I took
19 on the case.

20 It was too late for me to file any kind of opposition or
21 reply to their motion to dismiss in the discovery matter.

22 So I reached out to Mr. Desmond, who was the lead
23 counsel for defendants, and, basically, said that I thought that I
24 could dramatically simplify the matter, getting rid of a number of
25 parties, and simplifying the claims, if I was given some time to

1 come up to speed and file the amended complaint.

2 We entered into a stipulation, which was filed with the
3 Court prior to the hearing, in which they agreed to withdraw their
4 motion to dismiss. And that never happened.

5 So nobody showed up for this hearing. The Court granted
6 the motion, right? But that was not the way it was supposed to
7 happen.

8 Subsequent to that, Mr. Desmond and I entered into
9 conversations, and his argument was that the venue was improper.

10 Whether -- I mean, that's a debatable issue. That was
11 never decided by the Court on the merits, but I agreed to transfer
12 the case to Nevada.

13 So with respect to the damages incurred by the
14 plaintiffs with respect to, you know, the attorney fees for the
15 California case, it is not -- simply not the case that this
16 dismissal was proper.

17 It was in direct violation of the stipulated filing,
18 stipulated agreement between the parties.

19 THE COURT: And you said that stipulation was filed?

20 MR. MOQUIN: Yes. In fact, it's stamped. The copy that
21 I have attached is file stamped.

22 And I received -- I mean, I reached out -- just to make
23 sure everything had happened as requested, I reached out to
24 Mr. Desmond's secretary the Friday before the Tuesday of the
25 hearing. And she confirmed that the hearings had been taken off

1 calendar, which was not the case.

2 So I don't have any idea why that happened, but it --
3 the declaration of Mr. Desmond is not accurate, to put it mildly.

4 So I think that the question here -- and I appreciate
5 the point that you are making. I think that the question is
6 whether or not the fees that were incurred were reasonable, that
7 is, is there a natural relationship, a reasonable relationship
8 between the fees that were incurred and the breach; that is, are
9 they -- are they a proximate result of the breach.

10 With respect to Mr. Willard having to declare
11 bankruptcy, in fact, this is another point that is easily refuted.

12 In their reply, defendants claim that they had no
13 knowledge of the terms of the note that Mr. Willard had taken out
14 for approximately \$13 million when he purchased the Virginia
15 property.

16 If you look at Exhibit 32, page 2, Section 2.2,
17 Defendants expressly consent to and approve all provisions of the
18 note and deed of trust that was entered into.

19 Now, that was not attached to this particular filing or
20 recorded document, but they have averred here that they looked at
21 and saw the terms.

22 So in terms of foreseeability, when you have an
23 \$87,000 -- when you have an \$18 million property with a \$13 million
24 mortgage in place, \$87,000 a month in mortgage costs, and without
25 warning, without notice, your income suddenly goes to zero, I

1 think it is a natural result that you are going to potentially
2 have to seek bankruptcy protection.

3 I think that naturally flows. And that is a third-party
4 cost. It's a third-party cost, which is, in fact, also
5 recoverable under Section 20-B Subsection 5.

6 And that, of course, also holds with respect to the
7 attorney's fees incurred by the Wooley plaintiffs.

8 THE COURT: So with regard to this and the assertion
9 that there's no evidence that some of the claimed damages have
10 been paid, did they -- you keep using the term "incurred." Did
11 they actually pay the attorney's fees?

12 MR. MOQUIN: Yes.

13 THE COURT: And with regard to the closing costs?

14 MR. MOQUIN: We -- upon further scrutiny of the
15 settlement agreement with the receiver for Telesis, it turns out
16 that Mr. Willard would not have been entitled to any additional
17 fees.

18 And so we are, basically, withdrawing.

19 THE COURT: On the closing costs?

20 MR. MOQUIN: That's correct.

21 THE COURT: Okay.

22 MR. MOQUIN: On the closing costs and the costs -- all
23 costs associated with the short sale.

24 The only thing that remains with respect to the short
25 sale, basically, the diminution in value, which is only tacitly

1 related to that because the diminution of value is not as great as
2 if you were to use the value of the short sale. Okay?

3 But that was not a point that was brought up in the
4 motion for summary judgment, so I don't think that's appropriate
5 to argue it here.

6 But with respect to earnest money, we're not seeking
7 that. With respect to --

8 THE COURT: That was the 4.4 million?

9 MR. MOQUIN: Yes.

10 With respect to the tax consequences, again, upon
11 further research, I do not believe that -- because it is, in fact,
12 the case that Mr. Willard did not have to pay them, they are not
13 recoverable.

14 However, the loss of the net operating loss
15 carryforward --

16 THE COURT: So this is a different damage model than is
17 actually the subject of the motion?

18 So the motion with regard to Mr. Willard, or the Willard
19 plaintiffs, more accurately, the short sale damages, one, you are
20 withdrawing any claim for earnest money invested in the property;
21 two, withdrawing any claim for tax consequences resulting from the
22 cancelled mortgage debt --

23 MR. MOQUIN: Well --

24 THE COURT: -- and three, withdrawing any closing costs.
25 And instead, you may be making a claim for some sort of diminution

1 in value.

2 And the next point is?

3 MR. MOQUIN: Diminution of value is actually part of the
4 original amended complaint claim.

5 However, with respect to tax consequences -- and this is
6 where it gets a little bit convoluted because it's not direct
7 consequence -- it's not the direct tax liabilities that we're
8 seeking.

9 It is the loss of the tax benefit in terms of the net
10 operating loss and the loss carryforward.

11 THE COURT: I understand.

12 MR. MOQUIN: Okay. Now, with respect to that, I do
13 agree that that needs to be -- there is not a dollar-for-dollar
14 correspondence in terms of damages, but --

15 THE COURT: And one of the questions that I was going to
16 pose to Mr. Irvine was that very thing.

17 You can assert that simply because -- if it's a
18 dollar-to-dollar type of damage, do all damages have to be dollar
19 for dollar, because it seems to me that there are damages that are
20 collectible in some cases that are not dollar for dollar. Do you
21 agree?

22 MR. MOQUIN: I do. I do.

23 And I think that, although it is not the case that --
24 well, let me first explain that the reason that these damages were
25 not part of the complaint is because this all happened subsequent

1 to the complaint being filed, the amended complaint being filed.

2 Mr. Irvine made a statement claiming that we had never
3 submitted a statement of damages --

4 THE COURT: Under 16.1.

5 MR. MOQUIN: -- per 16.1, that is -- I dispute that.

6 Now, we will be supplementing, but --

7 THE COURT: Do you have evidence of that? Have you --
8 do you have a copy of the 16.1 information that you provided, or
9 are you saying you are going to amend it?

10 MR. MOQUIN: No, I'm saying that we provided, and in
11 discovery responses, went to great lengths to explain the basis.

12 Now, whether or not -- I'll have to search. Whether or
13 not that was in the form of a formal 16.1 response, I can't answer
14 without looking at my data entries here, but they were provided
15 with a calculation of damages.

16 THE COURT: And that calculation of damages, did it
17 include the amounts that you are advising the Court today that are
18 withdrawn?

19 MR. MOQUIN: Part. In part. In part, it did.

20 THE COURT: So as we sit here today, have you provided
21 an up-to-date and clear picture of plaintiffs' damage claims?

22 MR. MOQUIN: I was intending to before I came down with
23 the flu and that knocked me out, but --

24 THE COURT: So no?

25 MR. MOQUIN: Not 100 percent.

1 With respect to the Wooleys, they do have --

2 THE COURT: Okay.

3 MR. MOQUIN: They do. But with respect to Willard, they
4 do not.

5 THE COURT: Okay. All right.

6 So it's a work in process?

7 MR. MOQUIN: I thought that it best to wait for the
8 decision with respect to the issues at hand here.

9 THE COURT: Okay. But as to the Wooley plaintiffs, this
10 has been provided to them previously?

11 MR. MOQUIN: Yes.

12 THE COURT: Now, do you want to -- are you -- was there
13 anything with regard to the Willard plaintiffs that -- I
14 interrupted your flow.

15 And is there anything else you want to apprise the Court
16 of?

17 MR. MOQUIN: Yes. With respect to this loss
18 carryforward, I was saying that that is, you know, a tax issue,
19 but it is not actual taxes.

20 And the way it works is that under the IRS code, if --
21 if you have debt forgiveness, that is considered taxable income.
22 And to minimize that, what you need to do is go through and apply
23 what are called tax attributes, one of which is any loss
24 carryforward that you have.

25 So in order for him to avoid having to pay approximately

1 \$6 million in taxes, pretty much the only way that he can minimize
2 or get rid of that was by applying these loss carryforwards.

3 So the debt forgiveness was a direct result of the need
4 for -- I mean, of the foreclosure, which was a direct result of
5 the breach.

6 In terms of the loss carryforward damages, there was a
7 statement made at the very end of the report that was submitted
8 that because Mr. Willard didn't have to pay any taxes, he incurred
9 no damages, which doesn't --

10 THE COURT: And the report you are referring to is their
11 expert?

12 MR. MOQUIN: The supplement, yes. It was tendered after
13 their response a couple of weeks ago.

14 THE COURT: Okay.

15 MR. MOQUIN: And the best analogy I can come up with to
16 show that that just doesn't make any sense is if I -- let's say
17 that somebody runs into my car and does \$10,000 worth of damage.
18 And I take my car to my friend at a garage, who happens to owe me
19 \$10,000, and he says, in return for you waiving what I owe, I'll
20 fix your car, and he does.

21 For the person that hit my car, then, to say that I
22 incurred no expenses, it's just not -- it's not correct because
23 the amount of money that my mechanic friend owed to me is no
24 longer there.

25 The same is true of this loss carryforward, which is no

1 longer available with respect, actually, to both of the plaintiffs
2 because they had to be used to minimize the tax liabilities
3 imposed by virtue of the breach.

4 So to that extent, although we're not seeking -- well,
5 in terms of Willard plaintiffs, they are not seeking reimbursement
6 for direct tax consequences.

7 THE COURT: I understand, but it's because they lost the
8 use of this, essentially.

9 MR. MOQUIN: Exactly. And at law, that is considered an
10 asset.

11 THE COURT: Uh-huh. Okay. All right. So with regard
12 to -- you've talked about the attorney's fees. Did you want to
13 add anything else to that with regard to the Willard claims?
14 Because then I would like you to address the Wooley plaintiffs,
15 Baring Boulevard property issues -- or, not "issues," claims.

16 MR. MOQUIN: Yeah, I would just point the Court to the
17 section in my opposition in which -- in which I went through and
18 talked about indemnification. Okay?

19 But other than that, I think we're done with respect to
20 Mr. Willard.

21 THE COURT: Okay.

22 MR. MOQUIN: In terms of the Wooleys, again, the
23 indemnification clause comes into play here because the bank
24 foreclosing on both of these properties, were it not the case that
25 both the Baring and the Highway 50 property happened to have loans

1 issued by the same bank, we wouldn't have this
2 cross-collateralization issue.

3 But, in fact, they were, both loans. And that's the
4 issue here.

5 So because of the breach, Mr. Wooley was no longer able
6 to support the mortgages on both. And because the Highway 50
7 property was not income producing, he really had no choice but to
8 sell one of the properties, and the only property that was viable
9 to sell was the Baring property.

10 And he sold that, again, out of necessity, at a loss.
11 The statement that was made in reply that Mr. Wooley somehow
12 pocketed \$870,000 in closing ignores the fact that he put up over
13 a million in earnest money.

14 So there was actually a loss there.

15 THE COURT: But doesn't that actually -- didn't he
16 sustain some benefit from that loss --

17 MR. MOQUIN: Not at all.

18 THE COURT: -- tax wise?

19 MR. MOQUIN: No. I mean -- what do you mean? In what
20 sense?

21 THE COURT: Well, obviously, there are situations where
22 a loss, not dollar for dollar -- that is a contrary argument to
23 the Willards -- but there's some benefit to the fact that they
24 sustained a loss?

25 MR. MOQUIN: No, I don't believe there was any. And in

1 fact, there was detriment because what that did was terminate his
2 1031 exchange, which made him liable for capital gains.

3 THE COURT: Right.

4 MR. MOQUIN: Right?

5 THE COURT: Okay.

6 MR. MOQUIN: So I do not believe there's any benefit in
7 any way to him having -- have to sell this at loss.

8 THE COURT: Okay. Thank you for answering that.

9 MR. MOQUIN: Sure.

10 THE COURT: Go ahead.

11 MR. MOQUIN: So, again, in terms of this
12 cross-collateralization, I think that the issue for the Court to
13 really decide here is one of proximate cause.

14 That is, given the fact that we are somewhat removed
15 from the actual breach -- property that was breached, are the
16 damages that were incurred -- and I don't think there's any
17 disputing that there were damages incurred by virtue of the sale
18 of the Baring property. Are they recoverable?

19 And I think if we look to the indemnification clause and
20 the definition of "losses," I think the answer is that this was,
21 in fact, foreseeable. It was foreseen and it was bargained for.

22 Plaintiffs, to my understanding, did not write this
23 lease. And, in fact, this lease and minor variations of it were
24 used by -- I believe it was upwards of 30 different landlords that
25 Berry-Hinckley had leased properties from.

1 So, you know, the lease terms are there because
2 Berry-Hinckley put them in, and they should be held to them.

3 I think that it's clear -- you know, it's certainly the
4 case that you do not have to explicitly spell out every
5 conceivable type of damage in order for it to be recoverable. And
6 the phrase "any and all damages," coupled with this list, I think,
7 is dispositive of the issue.

8 THE COURT: All right. Thank you.

9 With regard to the Wooley plaintiffs now, you have
10 already discussed the attorney's fees. So are there -- I'm
11 assuming it's the same -- similar to the Willard claims?

12 MR. MOQUIN: Yes, it's identical.

13 THE COURT: Right. Is there anything else you would
14 like to address in opposition to the motion?

15 I think your client may want to talk with you for a
16 moment. So why don't we take a brief break.

17 MR. MOQUIN: Yeah, I would appreciate if I could go --

18 THE COURT: And I'll be back on the bench at 11:05.

19 (A recess was taken.)

20 THE COURT: You may continue, Counsel.

21 MR. MOQUIN: Your Honor, I just have three small points,
22 and then I'm done.

23 The first is that, in fact, the Wooleys did pay all the
24 taxes that were alleged.

25 THE COURT: Okay. The Wooleys or the Willards?

1 MR. MOQUIN: The Wooleys, yes. And those are damages
2 that are being sought.

3 THE COURT: And that is due to the 600,000 in damages
4 incurred when the Wooleys had to sell the Baring property?

5 MR. MOQUIN: That's correct.

6 And I think it's important -- there are two aspects to
7 these leases which, I think, are important to note.

8 The partial nature of these leases, the fact that this
9 was, as Mr. Irvine pointed out, a triple net lease, the landlords
10 expected these things to, basically, cause them no problems; that
11 is, they had triple net. They were not responsible for
12 maintenance, taxes, property taxes, anything.

13 And in entering into these leases, there was an
14 expectation, I think, on both sides that this was going to be a
15 pretty turnkey situation, that the landlords own the properties,
16 they lease them to the defendants, and wouldn't have to worry
17 about them.

18 In fact, in March 2007 -- oh, there's another point.
19 The subrogation agreement predates by over a year the amended
20 lease. So the claim that it -- that this knowledge of the Willard
21 lease -- I mean, the Willard loan was not prior to the lease
22 being --

23 THE COURT: So it postdated the original lease, but
24 predated the amended lease?

25 MR. MOQUIN: Correct. Correct. And that is when

1 Mr. Herbst came into the picture as guarantor.

2 He came into it -- bought Berry-Hinckley in 2007,
3 renegotiated all the contracts, all the leases with all the
4 landlords that Berry-Hinckley had been renting from, and demanded
5 that -- well, actually, what he did was, he agreed to personally
6 guarantee these leases in return for certain changes being made to
7 the leases.

8 The most important one, I think, was that the
9 modification of the first amended leases gave him the right to
10 subrogate his leasehold without first obtaining the permission of
11 the landlords, which he did in obtaining a \$74 million line of
12 credit from First National Bank of Nevada, which was secured by
13 his leasehold interest in all of these properties, including the
14 plaintiffs' properties.

15 And the only reason he was able to do that without
16 seeking the permission both of the plaintiffs and the plaintiffs'
17 lenders is because of this amendment.

18 So this amendment was, you know, material and, in fact,
19 he was at that point apprised of the fact that there was this
20 enormous loan in place.

21 THE COURT: But just because -- let's assume that that
22 is correct, that this amended lease came after and that he knew
23 that this other loan was in place.

24 Is it still foreseeable on his part that the payments
25 wouldn't be met?

1 MR. MOQUIN: That the loan payments --

2 THE COURT: The loan -- I may have said "lease." I
3 meant to say "loan payments."

4 MR. MOQUIN: I think, given the enormity of the loan,
5 it's very easy to amortize out what the monthly payment would be.

6 I mean, this is not your normal -- in fact, I could not
7 find a case anywhere close to this value in all of Nevada case law
8 dealing with an \$18 million property where the monthly rent at the
9 time of the breach was \$142,000 a month.

10 Now, to go from that, with \$87,000 being due for a
11 mortgage, to zero, I think it's reasonable to -- you know, I think
12 that it's reasonable for somebody to suspect that there's going to
13 be some serious fallout from that. There's going to be --

14 THE COURT: And that this was the plaintiffs' only
15 source of income?

16 MR. MOQUIN: At the time of the breach, yes.

17 THE COURT: And that Mr. Herbst or Berry-Hinckley had
18 reason to know that?

19 MR. MOQUIN: I don't think it's relevant.

20 In fact, whether or not -- see, we're getting into an
21 area here where whether or not there was a mortgage on the
22 property, okay, is not really important in terms of the damages.

23 Now, it does come into play now, given the fact that
24 there was, okay, but given the language in the lease, the "any and
25 all damages" provision under Nevada law, which I've cited in my

1 opposition, is binding and not subject to reinterpretation.
2 There's nothing ambiguous about it.

3 And so the claim that this was not foreseeable and was
4 not contemplated at the time of contract formation is simply
5 untrue because they put those provisions in, into the lease.

6 It wasn't necessary for them to put the indemnification
7 clause in. In fact, I think in Section 12 or 13, there's an
8 environmental indemnification clause. So this additional
9 Section 15, they put in as an added protection for the lessor.

10 But the "any and all" language is -- you know, under
11 Nevada law and under California and everywhere that I have looked,
12 it's not -- I mean, it would be infeasible to have to list all the
13 different particular damages that could potentially arise.

14 The "any and all" language itself is interpreted, as far
15 as I can tell, across the board to mean "reasonably proximate
16 damages."

17 THE COURT: All right. Thank you.

18 Is there anything else?

19 MR. MOQUIN: No, Your Honor. Thank you.

20 THE COURT: Thank you.

21 Counsel.

22 MR. IRVINE: Thank you, Your Honor.

23 It struck me in briefing our reply that plaintiffs
24 didn't address or didn't do much to address a couple of things
25 that we argued in the motion. And we're still there today.

1 They haven't addressed the concept of foreseeability,
2 number one.

3 And they haven't addressed the requirement under the
4 Christopher Homes case for attorney's fees. Their arguments
5 simply fly by those.

6 With respect to foreseeability, Mr. Moquin keeps coming
7 back to the indemnity provision. And he says you don't need to
8 look at foreseeability because of this broad boilerplate language
9 that says "any and all."

10 Well, firstly, I would, again, talk about what an
11 indemnity provision is. He didn't address any of the case law
12 that I cited in the reply, the Boise case, the Pacificorp case,
13 the May Department Store case, or the KMart case from the federal
14 court -- federal bankruptcy court in Illinois, that says that
15 indemnity provisions are designed to protect against claims
16 brought by third parties, not for direct claims between the
17 contracting parties.

18 The best example is a slip-and-fall. Someone falls
19 while they are in a Terrible Herbst gas station and breaks their
20 arm, and then they sue the owner, because they find out who the
21 owner of the property is, and it's Mr. Willard.

22 Then Mr. Willard would certainly have a right to
23 indemnity from the tenant for that act, because it's a triple net
24 lease and they are responsible for the entire premises.

25 But that doesn't extend to cases like this with

1 Mr. Willard's personal income taxes that are remote from the
2 breach we're talking about here. That's not what an
3 indemnification provision is.

4 And with respect to the "any and all" language that he's
5 relied on throughout his argument, I would direct the Court to the
6 Boise case from the Oregon Court of Appeals where they are
7 addressing a very similar argument where the party was seeking to
8 recover its \$600,000 investment in the property and was attempting
9 to rely on the indemnity provision to do it.

10 And this is at -- I'll use the Pacific cite. This is at
11 page 709.

12 In there, the Court analyzes the indemnity provision,
13 which says "Tenant's Covenants of Indemnity," which reads that
14 "Tenant further covenants and agrees to protect, indemnify and
15 forever save harmless the Landlord and the Demised Premises of and
16 from any and all judgments, loss, costs, charges," et cetera.

17 Again, a very broad indemnity provision.

18 But the trial court here says this doesn't apply. It's
19 redundant to other paragraphs, remedies paragraphs, and it doesn't
20 apply to direct claims between the contracting parties.

21 The Court goes on to say on page 710 of that decision,
22 that "under the indemnity paragraph, defendant would be required
23 to indemnify BJV for claims that might arise out of defendant's
24 failure to perform his obligations under the lease, such as a
25 failure to pay assessments or taxes.

1 "But we agree with the trial court's interpretation that
2 the indemnity paragraph does not apply to claims between the
3 parties and does not provide a contractual basis on which BJV may
4 recover its lost equity."

5 So it's the same type of language we're faced with here,
6 and that Court said it didn't apply to direct claims between the
7 parties.

8 I apologize for getting on my phone, Your Honor, but I
9 didn't print the May Department Store cases, but that case is
10 similar.

11 It analyzes an indemnity provision, which says that the
12 tenant shall indemnify and hold harmless against -- it doesn't say
13 "any and all," it says "all claims, damages, costs, expenses," on
14 and on and on.

15 And, again, in that case, the May Department Store case,
16 the Court said no. It said that indemnity language is construed
17 to apply only to claims asserted by third parties against the
18 indemnitee, not to claims based upon injuries or damages suffered
19 directly by that party.

20 So, again, we're talking about a slip-and-fall. We're
21 talking about a scenario where my tenant might have done a tenant
22 improvement at one of these stores and not paid the contractor,
23 and the contractor goes after the owner. This is not for the
24 damages they are seeking here.

25 And frankly, Your Honor, if you buy their argument that

1 this sort of broad, "any and all" type indemnity language somehow
2 obviates the requirement under Nevada law that damages be
3 foreseeable, you can throw out the restatement, you can throw out
4 Hilton, you can throw out Hadley v. Baxendale, because these go
5 back that far.

6 Damages have to be reasonably foreseeable under a
7 contract case, and the inclusion of boilerplate language like that
8 doesn't eliminate that requirement.

9 With respect to the attorney's fees argument, we simply
10 shouldn't have to pay for their decision to file in the wrong
11 venue.

12 I would direct Your Honor to Section 38-H of the lease.
13 And I'm at the Willard lease, which is Exhibit 2 to our motion.
14 This is at page 25 of that lease.

15 Section 38-H clearly says that the parties hereto
16 expressly submit to the jurisdiction of all federal and state
17 courts located in the state of Nevada. Nevada law applies.

18 And it says also that the lessor can commence proceeding
19 in the federal or state courts located in the state where each
20 property is located.

21 Again, these properties are located in the state of
22 Nevada. They chose to go file these over in California. Frankly,
23 we shouldn't have to pay for that, even if these damages were
24 available under Christopher Homes, which they are not, which
25 Mr. Moquin didn't address.

1 I'll touch on his improper dismissal argument briefly.
2 I won't get into the details on that. I'll rely on Mr. Desmond's
3 declaration attached to the reply.

4 I think our position is very clear there, but it doesn't
5 matter because none of the fees that plaintiffs incurred in
6 California were in any way caused by an improper dismissal, even
7 if that were true.

8 These fees were all incurred in filing the motion --
9 filing the complaint and dealing with motions to quash and motions
10 to dismiss over there.

11 All the work was done. The case was dismissed at the
12 end, and that in no way changes the fact that they didn't have to
13 bring either that or, in fact, the bankruptcy over in California.

14 As Your Honor noted, these were their choices. These
15 were their voluntary choices, and we shouldn't have to pay for
16 them.

17 And under Christopher Homes, these are not -- these are
18 not special damages that are available for attorney's fees. This
19 is not an action to remove a cloud on title, which is one of the
20 prongs. And it's not an indemnity type case where they were
21 forced to litigate against a third party due to our breach.

22 So under the clear authority of Christopher Homes, these
23 types of damages aren't available anyway.

24 I'm sorry, Your Honor, I'm bouncing around a little bit,
25 trying to keep this short.

1 The argument that Mr. Moquin made with respect to
2 Exhibit 32 to the opposition, which is the subrogation
3 agreement -- I'm sorry, I'll get there.

4 Again, this was entered into after the original lease
5 was executed. And Mr. Moquin is correct, that this subrogation
6 agreement happened between the execution of the original lease and
7 the amendment of the lease and the guarantee by Mr. Herbst.

8 But that doesn't matter. You have to go back to the
9 original lease because that is when Berry-Hinckley signed on the
10 dotted line and agreed to be liable for all the obligations under
11 the lease.

12 You have to go back to that date, because if
13 Berry-Hinckley knew at that time that it would be responsible for
14 all of these financing type damages that plaintiffs are going to
15 assert, that was its chance to not enter into the lease.

16 After that, it's bound. And so anything that happens
17 after that doesn't have any bearing on foreseeability.

18 Not only that, Mr. Herbst's guarantee under Nevada law
19 is clearly limited to BHI's obligation under the four corners of
20 the lease. He doesn't assume anything outside the four corners of
21 the lease, and he doesn't assume anything that Berry-Hinckley
22 wasn't responsible for.

23 And the language of the guarantee is consistent with
24 that paragraph 1, which I won't read. It's a short paragraph.
25 But it says that he's responsible for what BHI is responsible for.

1 In addition, I would note that the subordination
2 agreement at Exhibit 32 -- I touched on this in my direct
3 argument. This refers Berry-Hinckley and Mr. Herbst at best to
4 the fact that a loan existed with the South Valley National Bank
5 at that time.

6 They were never put on notice of the loan with Telesis,
7 which is the loan they are seeking damages for. So I think that's
8 significant.

9 And as Your Honor pointed out, BHI and Mr. Herbst had no
10 way of knowing if Mr. Willard or his company could satisfy the
11 debt service on this property without the loan. They had no way
12 of knowing whether this was his only source of income or whether
13 he could pay this on his own without the lease payments.

14 There has been no evidence of any special knowledge from
15 the Herbsts on that fact.

16 Your Honor, I want to touch briefly on some of the
17 damages that they had withdrawn. They said they withdrew their
18 claim for the closing costs for the Willard short sale and for the
19 earnest money and for the tax consequences, but that they wanted
20 to continue with their claim for the capital loss carryover.

21 Again, Your Honor, these damages are even less
22 foreseeable than the tax consequences damages they were seeking
23 before.

24 If you play this out, it's not a probable result of a
25 breach of the lease. You would have to have a breach of the lease

1 followed by a threatened foreclosure, followed by a threatened
2 short sale, which was, then, completed.

3 And you would have to know about Mr. Willard's
4 accounting and tax treatment over the years. There's no evidence
5 in the record that the Herbsts had any way of knowing that they
6 were carrying these capital loss carryovers as assets.

7 We don't have access to their bank records. We don't
8 have access to their tax returns. We don't have access to their
9 accountants at any point in time prior to the breach.

10 This is all brand-new arguments. And, frankly, it's not
11 in the complaint. It's not in anything that they did in
12 discovery.

13 The first time we found out about this new theory was in
14 the opposition. But I still think it's appropriate for the Court
15 to decide it and deny their ability to seek it, because it's
16 simply not foreseeable.

17 In addition, they talk about trying to keep their claim
18 for diminution in value on the Willard property. Your Honor, that
19 is a new damage as well. There is nothing in the complaint about
20 any diminution in value claim for Willard.

21 I will concede that they have a claim for Mr. Wooley.
22 At paragraph 34 of the first amended complaint, they claim a
23 \$2 million diminution in value damage on the Highway 50 property,
24 which is not subject to the motion that we're arguing here today.

25 But there's absolutely no claim in here about a

1 diminution in value claim for the Willard plaintiffs.

2 And, in fact, the only time we heard about that was,
3 again, for the first time in the opposition at page 10, I believe,
4 the very last sentence on page 10 where they say "Due to BHI's
5 abandonment of the Virginia property and subsequent breach of the
6 interim operation and management agreement, the Virginia property
7 suffered a dramatic diminution in value, the amount of which is
8 not relevant to the instant motion."

9 That sentence, Your Honor, is the first time we ever
10 heard of that damage. We've never been put on notice of anything
11 like that before.

12 Which takes me to the 16.1 damages disclosure issue.
13 Now, Mr. Moquin doesn't practice here. I don't know if he
14 understands this rule.

15 But as you know, Your Honor, 16.1 imposes upon
16 plaintiffs an affirmative obligation to disclose their calculation
17 of damages, along with any supporting documentation of those
18 calculations.

19 We have never in this case received a 16.1 disclosure
20 with any damages computation. We've had to pull damages from them
21 through interrogatories and depositions, but that shouldn't,
22 frankly, be our job.

23 It's their affirmative obligation to do that and to
24 continue to do that as their damages claims change, which it
25 continues to do in this case.

1 I'm not going to say we don't have some information
2 about damages, but we certainly have never received a 16.1 damages
3 disclosure.

4 And the Wooley damages computation that Mr. Moquin was
5 referring to, we received after the deadline for disclosing
6 initial expert witness reports. And the spreadsheet that I got
7 from him, he gave me to use for settlement purposes only.

8 I'm, obviously, not going to discuss the contents with
9 the Court because of that, but as of right now, I don't have even
10 have authority to disclose that to my experts to do anything with.

11 So they have not done their job of getting us what their
12 damages are. And it's starting to become fairly critical with the
13 deadlines that are approaching in this case.

14 I know that's not entirely relevant to your decision
15 here today, but because it was raised, I wanted to address it.

16 And then finally, with respect to the Wooley damages for
17 Baring, Mr. Moquin went back to the indemnification provision.
18 I've already addressed that.

19 I would take issue with his argument that all you have
20 to do is have a reasonable proximate cause to get these damages.
21 I mean, the Hadley v. Baxendale case, the Hilton case, the
22 restatements, they are all there for a reason.

23 They are there for policy reasons, to limit damages for
24 contracting parties to what they contracted to do.

25 And that's what we're asking for here. We're asking the

1 liability on the defendants to be limited to what's in the four
2 corners of the contract, not some proximate cause where you could
3 see a lot of slippery slopes, including being, essentially, held
4 as a guarantor for debt service and the like.

5 If you have any questions, I'm happy to answer them.
6 Otherwise, I think I've covered everything he had.

7 THE COURT: No. I think I have asked all of my
8 questions of both parties.

9 MR. IRVINE: Thank you, Your Honor.

10 THE COURT: I want to thank everyone for their
11 substantial papers and opposition and the time that went into
12 compiling these. I know that it takes a great amount of skill and
13 time.

14 In reviewing this, and going back to the standards of
15 Rule 56, where there is a partial adjudication, where it does not
16 actually adjudicate the entire case, it appears that the Court,
17 after the hearing the motion, by examining the pleadings and the
18 evidence before it, and by interrogating counsel, shall, if
19 practicable, ascertain what material facts exist without
20 substantial controversy and what material facts are actually, in
21 good faith, controverted, and thereafter, the Court must enter an
22 order.

23 I have, as an overview, concern with regard to the
24 affidavit that was submitted by Mr. Tim Herbst. Under 56(e), they
25 must be made on personal knowledge. And the format of that

1 affidavit is very clearly on information and belief. And it begs
2 the question of where Jerry Herbst is.

3 However, in reviewing this -- and the Court and my law
4 clerk, Ms. Booher, spent a substantial amount of time carefully
5 going through it -- and I'm prepared to rule, even with
6 disregarding that affidavit, and I'm going to do so with an
7 abundance of caution.

8 The depositions that are attached provide the Court what
9 is sufficient information, and where both parties have submitted
10 documents, that this Court can deem them as admissible evidence.
11 And the Court finds that the motion for summary judgment should be
12 granted.

13 In considering this, for the record, I am considering
14 the following damage categories.

15 One, as to the Willard plaintiffs, the short sale
16 damages incurred as a result of having to sell the property,
17 including earnest money invested in the property; tax consequences
18 resulting from the cancelled mortgage debt, and closing costs;
19 attorney's fees with regard to the voluntary bankruptcy,
20 attorney's fees for the California action.

21 With regard to the Wooley plaintiffs, the Court is
22 considering summary judgment as it relates to the \$600,000 in
23 damages incurred with regard to selling the Baring property due to
24 the fact it was cross-collateralized, and the attorney's fees the
25 Wooley plaintiffs incurred from the California action that was

1 dismissed.

2 In doing so, I understand that you've indicated, and the
3 record is clear, with regard to which damages the plaintiff has
4 withdrawn.

5 Any damages that are not in these categories and the
6 subject of the motions will have to be the subject of future
7 motion practice, if the parties wish to narrow down the action.

8 In accordance with this, the Court finds as follows:

9 The Court concurs with -- as an overview, with the
10 plaintiff that you cannot identify in every single contract each
11 and every type of damage claim. However, the Court disagrees that
12 foreseeability does not apply. And the Court finds that as a
13 matter of law, that it does apply in the analysis.

14 In addition, the Court finds that the Christopher Homes
15 versus Liu case applies with regard to the special damages
16 requested in the form of attorney's fees.

17 Therefore, that being said, based on the motion,
18 opposition, the reply and supplement, the Court finds as follows:

19 With regard to the Willard lease, in 2005, Willard and
20 Berry-Hinckley Industries entered into a commercial lease,
21 called -- which I will designate the Willard lease, for the lease
22 of property in Reno, Nevada.

23 In 2013, Mr. Willard filed for bankruptcy. The
24 bankruptcy was voluntarily dismissed shortly after filing it.

25 In March 2014, Mr. Willard sold the Willard property in

1 a short sale.

2 While under the Hilton case it can be construed that the
3 type of foreseeability and the type of damages that are claimed in
4 this case must be submitted to the jury, the Court finds, based on
5 the deposition transcripts that were attached, specifically, that
6 the plaintiffs admit that the defendant had no reason to foresee
7 the items of damage which I have itemized, and that is sufficient
8 without the submitted affidavit from Mr. Tim Herbst.

9 In addition, the Court finds that with regard to the
10 Wooley leases, in 2005, Berry-Hinckley Industries and Wooley
11 entered into a commercial lease for the lease of property on
12 Highway 50 in Nevada, known as the Highway 50 lease.

13 In 2006, Wooley bought property on Baring Boulevard,
14 which I'll designate the Baring property. And Berry-Hinckley,
15 BHI, and Wooley entered into a separate lease for that property.

16 Wooley entered into a mortgage loan for the Baring
17 property, which purportedly contained a clause which
18 cross-collateralized the Baring property and the Highway 50
19 property.

20 Neither Berry-Hinckley Industries nor Mr. Jerry Herbst
21 were parties to the mortgage loan.

22 The Wooley plaintiffs have not set forth any evidence to
23 establish that BHI or Mr. Jerry Herbst knew about the
24 cross-collateralization provisions.

25 Wooley entered into this loan after the parties had

1 entered into the Highway 50 lease.

2 Wooley sold the Baring property while Jackson's Food
3 Stores, Inc., was a tenant and not Berry-Hinckley Industries.
4 Berry-Hinckley Industries was not in default of the Baring lease
5 when Wooley sold the Baring property.

6 The Court has applied all of the standards that are set
7 forth in Rule 56 with regard to whether or not -- as I indicated
8 earlier, the amounts are not -- for the Court's analysis, are not
9 important, it is the type of damages that are sought.

10 And the Court finds, based on the facts before us, that
11 the plaintiffs are not entitled to the damages that I itemized
12 earlier based on the fact either they are not foreseeable, or with
13 regard to the special damages, they are precluded by
14 Christopher Homes versus Liu.

15 Accordingly, this Court orders the plaintiff to provide
16 the Court with a proposed order. That proposed order will state
17 the following:

18 Each and every finding of fact supported by a citation
19 to the exhibits and not to the affidavit.

20 Secondly, that the plaintiff -- excuse me, I said
21 "plaintiff."

22 The defendant will provide conclusions of law supported
23 by the applicable authority. And specifically, it will include
24 Hilton Hotels, Margolese, Christopher Homes, the Boise case, all
25 of which the Court finds persuasive in ruling upon this motion.

1 Please, in addition, and separate and apart, the Court
2 enters a case management order that directs the plaintiff to
3 serve, within 15 days after the entry of the summary judgment, an
4 updated 16.1 damage disclosure.

5 That's the ruling of the Court. I would like the
6 proposed order within 15 days.

7 We'll be in recess.

8 MR. MOQUIN: Thank you, Your Honor.

9 (The proceedings concluded at 11:59 a.m.)

10 -o0o-

1 STATE OF NEVADA)
) ss.
2 WASHOE COUNTY)

3
4
5 I, CONSTANCE S. EISENBERG, an Official Reporter of the
6 Second Judicial District Court of the State of Nevada, in and for
7 the County of Washoe, DO HEREBY CERTIFY:

8 That I was present in Department 6 of the above-entitled
9 Court on January 10, 2017, and took verbatim stenotype notes of
10 the proceedings had upon the matter captioned within, and
11 thereafter transcribed them into typewriting as herein appears;

12 That I am not a relative nor an employee of any of the
13 parties, nor am I financially or otherwise interested in this
14 action;

15 That the foregoing transcript, consisting of pages 1
16 through 69, is a full, true and correct transcription of my
17 stenotype notes of said proceedings.

18 DATED: At Reno, Nevada, this 16th day of January, 2017.
19
20

21 /s/Constance S. Eisenberg

22 _____
CONSTANCE S. EISENBERG
23 CCR #142, RMR, CRR
24
25

EXHIBIT 3

EXHIBIT 3

1 Code No. 4185
2 SUNSHINE LITIGATION SERVICES
3 151 Country Estates Circle
4 Reno, Nevada 89511

5 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR THE COUNTY OF WASHOE

7 HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

8 LARRY J. WILLARD, et al.,

9 Plaintiffs,

Case No. CV14-01712

10 vs.

Department No. 6

11 BERRY-HINCKLEY, et al.,

12 Defendants.

13 _____/

14 TRANSCRIPT OF PROCEEDINGS

15 PRE-TRIAL CONFERENCE

16 December 12, 2017

17 Reno, Nevada

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19
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21
22
23 REPORTED BY: DEBORA L. CECERE, NV CCR #324, RPR

24 JOB # 437679

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Reno, NV 89501

775-343-7500

1 DECEMBER 12, 2017, TUESDAY, 10:11 A.M., RENO, NEVADA

2 -oOo-

3
4 THE COURT: This is the time set for pretrial
5 conference in Case No. CV14-01712, Larry Willard, et al.
6 versus Berry-Hinckley, et al.

7 Would you please state your appearances?

8 MR. O'MARA: Good morning, your Honor. David
9 O'Mara on behalf of the plaintiffs.

10 MR. MOQUIN: Brian Moquin on behalf of the
11 plaintiffs.

12 MR. IRVINE: Good morning, your Honor. Brian
13 Irvine on behalf of the defendants.

14 MS. WEBSTER: Good morning, your Honor. Anjali
15 Webster on behalf of defendants.

16 THE COURT: Good morning.

17 All right. As this is a pretrial conference, I
18 want to go over a couple of items.

19 And my intention is to go over the file motions
20 and where there's a nonopposition ask the party to submit
21 an order.

22 I want to set an oral arguments date for that
23 big stack of paper that's sitting there on my desk. And
24 then we're just going to go over some dates so everyone is

1 on the same page.

2 If there is anything that you would like to
3 bring up, please feel free to do so.

4 We are set for trial. My new trial date is not
5 on here. It is January 29th, correct?

6 MS. WEBSTER: Yes.

7 MR. IRVINE: Correct, your Honor.

8 THE COURT: And do you still believe that it
9 will be eight days, or do you think it will be longer or
10 shorter?

11 MR. O'MARA: Your Honor, I think that we're
12 going to have to -- Mr. Moquin is going to have to ask the
13 court today for an extension of time.

14 We notice that you want to do an order
15 submitting nonoppositions. Mr. Moquin has been trying to
16 finish those oppositions, and I told him he needs to
17 discuss that with the Court today. And we would hope that
18 the Court would have leniency on us to allow him to file
19 such oppositions because they would be so devastating to
20 our client if the Court just submitted orders on the
21 nonoppositions.

22 THE COURT: Okay. Well --

23 MR. O'MARA: The defendants are aware that we
24 have been trying to do the oppositions. And they have

1 provided us with extensions. We have filed an extension.
2 So it would be up to the Court as well as Mr. Moquin. I
3 just wanted the Court to be aware of that.

4 THE COURT: Okay.

5 MR. O'MARA: I'm sure Mr. Irvine will have his
6 response and go from there.

7 THE COURT: Let's just go about it this way. A
8 little bit different then.

9 We'll start with -- is anyone expecting to ask
10 for a continuance of the trial date?

11 MR. IRVINE: We are not, your Honor. We think
12 what would be a fourth continuance at this point, given the
13 plaintiffs' lack of compliance with the rules, or a
14 disregard of this Court's orders, and their failure to
15 provide basic damages information or expert disclosures
16 necessitate a dismissal. We've been clear in our moving
17 papers.

18 The motion for case ending sanctions that we
19 filed along with the two other motions, where the
20 oppositions were due last Monday, we did give them a couple
21 of brief extensions. We couldn't give them more than very
22 brief extensions because all motions must be submitted to
23 the Court for a decision by this Friday pursuant to the
24 stipulation and order that was entered last February.

1 And they've just simply failed to oppose the
2 motions. They filed with this Court a motion to extend the
3 time for them to respond to the motions, where they asked
4 until 4:30 on last Thursday.

5 I was assured by counsel that I'd receive
6 hand-delivery or email service of the oppositions to all
7 three motions by 4:30 last Thursday, and then nothing. I
8 didn't get a phone call. I didn't get an email. We still
9 don't have oppositions.

10 Your Honor, at this point, I mean my client
11 spent a lot of time and money trying to prepare a defense
12 to this case, and they've been thwarted in their ability to
13 prepare a defense because we just don't have the
14 information that the rules and this Court's orders would
15 require.

16 So we are happy to provide you with proposed
17 orders on all three motions. We're happy to set an oral
18 argument on all three of those motions. But we don't think
19 a fourth continuance of the trial is fair to our client
20 given what's been going on.

21 They're entitled to put this behind them and
22 move forward. And plaintiffs haven't played by the rules
23 or followed this Court's orders.

24 THE COURT: All right. Thank you.

1 Here's how we're going to do this. One, I have
2 the October 6th, 2014 Motion to Partially Dismiss
3 Plaintiffs' Complaint. No opposition filed. No reply.

4 That's one of them that you're adjusting,
5 correct?

6 Then I have a 10/28/2014 Motion to Associate
7 Counsel. And no opposition was filed. Defendants' Notice
8 of Nonopposition was filed on the plaintiffs at 10/29/2014.

9 So there's not an order entered on that,
10 correct? I mean, I realize this has gone up and back and
11 around. But I don't see an order on it.

12 MR. MOQUIN: I don't believe there is.

13 THE COURT: All right. So I want you to submit
14 an order.

15 Okay? Is this yours?

16 MR. IRVINE: The Motion to Associate Counsel I'm
17 assuming was --

18 THE COURT: It's yours. Filed by plaintiffs
19 Larry J. Willard.

20 MR. MOQUIN: We'll do that.

21 MR. O'MARA: We'll file an order, your Honor.

22 THE COURT: Just submit one, please.

23 MR. MOQUIN: Yes, your Honor.

24 MR. O'MARA: It was my understanding, I think,

1 that there was no objection, and the Court granted an order
2 at the previous hearing. But I'll, I'll get an order to
3 you --

4 THE COURT: Right. I just want to make sure we
5 have written orders on this.

6 MR. O'MARA: That's fine, your Honor.

7 THE COURT: And certainly we've been acting as
8 though it was granted.

9 Okay. Next we had Defendants' Motion to Compel
10 Discovery Responses filed by defendants with an Ex Parte
11 Order Shortening Time, Notice of Nonopposition to
12 Defendants' Motion to Compel Discovery Responses.

13 And, and later there was an Order Shortening
14 Time Filed. And then Order Granting Defendants' Motion to
15 Compel Discovery Responses was filed July 1st, 2015.

16 Has -- have you received those discovery
17 responses?

18 MR. IRVINE: Your Honor, I didn't review that
19 motion this morning. I think we certainly got substantial
20 compliance to it. I don't remember the scope of that. I
21 believe it was our first set of interrogatories, and I
22 think we did get answers to all of those.

23 THE COURT: Okay. 7/24/2015, Motion for
24 Contempt Pursuant to NRCP 45(e). And Motions for Sanctions

1 Against Plaintiffs' Counsel pursuant to NRCP 37.

2 Defendant filed an Ex Parte Motion for Order
3 Shortening Time, and Order Shortening Time was filed on
4 July 28th, 2015.

5 On this case there was no opposition, correct?

6 MR. IRVINE: That's correct, your Honor. But I
7 don't believe we ever submitted that motion.

8 THE COURT: Right, that was the next thing I was
9 going to say.

10 MR. IRVINE: I think that had to do with a
11 subpoena to a third-party witness, who is actually also the
12 expert that's the subject of our motion to strike. And I
13 believe we got the documents in time for the deposition so
14 we never submitted that.

15 THE COURT: Okay.

16 MR. IRVINE: So we would, we would withdraw that
17 motion.

18 THE COURT: Okay.

19 Next, Defendants -- 8/7/15, Defendants' Second
20 Motion to Compel Discovery Responses filed by Defendants
21 Barry Hinkley and Jerry Herbst; a Defendants' Ex Parte
22 Motion for Order Shortening Time was filed 8/7/15,
23 Emergency Request for Status Conference was filed. Order
24 Shortening Time was entered 8/11/2015, as well as an order

1 setting status conference of 8/12/2015.

2 Then we went to a status conference on August
3 17th. This Court granted the Defendant's Second Motion to
4 Compel Discovery Responses. It was filed on 8/17/2015. So
5 that's not at issue.

6 8/1/2016, Defendant/Counterclaimants Motion for
7 Partial Summary Judgment with a Request, Motion to Exceed
8 the Page Limit and a Supplement to
9 Defendants/Counterclaimants Motion for Partial Summary
10 Judgment filed 12/20. This was opposed and replied.

11 Defendants asked for page limit, to exceed the
12 page limit. The Court granted. Filed an order granting
13 Motion to Exceed Page Limit for both the motion and the
14 reply. And we set a hearing at the 12/9/2016 -- that's the
15 date the order was setting the hearing.

16 And then we had the hearing on January 10th,
17 2017, where the Court granted partial summary judgment and
18 ordered the defense counsel to prepare an order, which then
19 this Court entered on May 30th, 2017.

20 All right. The next one, it looks like, was
21 completed. It appears that you did object, but then I
22 filed the order.

23 Let's go to the next Motion for Summary Judgment
24 dated October 17th, 2017. Motion for Summary Judgment of

1 Plaintiffs Edward Wooley and Judith A. Wooley. Defendants
2 filed their opposition on November 13th, along with a
3 Motion to Exceed Page Limit on the same date.

4 Now as to this one there's no reply, correct?

5 MR. O'MARA: That's correct, your Honor.

6 THE COURT: Okay. And was this the subject of
7 an extension where you wanted to file a reply?

8 MR. MOQUIN: Yes, defendants gave an open
9 extension until the end of -- until this Friday.

10 THE COURT: Okay. So then you have an open
11 extension until Friday.

12 Okay. October 18th, Motion for Summary Judgment
13 by Plaintiffs Larry J. Willard and Overland Development.
14 Opposition was filed on November 13th along with a motion
15 to exceed page limit.

16 This one is in the same circumstance, correct?

17 MR. MOQUIN: Correct.

18 THE COURT: Okay. All right.

19 11/14, Defendants/Counterclaimants Motion to
20 Strike and/or Motion in Limine to Exclude the Expert
21 Witness, Expert Testimony of Daniel Gluhaich, along with a
22 Motion to Exceed Page Limit.

23 This one you have not filed an opposition,
24 correct?

1 MR. MOQUIN: Correct.

2 THE COURT: And is this -- a Request for
3 Submission After Notice of Nonopposition was filed by the
4 Defendants' Request for Submission 12/7.

5 And Mr. O'Mara, is this one of the motions that
6 you're wanting to file an opposition?

7 MR. O'MARA: Yes, your Honor.

8 THE COURT: Okay. And then 11/15, Defendants'
9 Motion for Partial Summary Judgment filed by Defendants
10 Berry-Hinckley and Jerry Herbst. No opposition was filed.
11 A Notice of Nonopposition was filed by defendants on 12/7.
12 And it was submitted.

13 This is in the same category?

14 MR. O'MARA: Yes, your Honor.

15 THE COURT: Okay. 11/15,
16 Defendant/Counterclaimants Motion for Sanctions Requesting
17 Oral Argument filed by Defendants Berry-Hinckley and Jerry
18 Herbst. Motion to Exceed Page Limit was filed on the same
19 date. No opposition was filed to this. And a Notice of
20 Nonopposition was filed by the defendants on 12/7, and it
21 was submitted on 12/7.

22 So this is the third one in that category,
23 correct?

24 MR. O'MARA: Correct.

1 THE COURT: Okay. And lastly, the December 6th,
2 2017, Plaintiffs' Request for Brief Extension of Time to
3 Respond to Defendants' Three Pending Motions and to Extend
4 the Deadline for Submission of Dispositive Motions filed by
5 all plaintiffs.

6 No opposition was filed, right?

7 Isn't it your -- you still have until next week?

8 MR. IRVINE: Yes, your Honor. And I can
9 certainly file an opposition to that.

10 I think it had two requests for relief. One was
11 for an extension through 4:29 p.m. on December 7th, to file
12 the three oppositions that we just discussed.

13 And so I would submit that that portion of the
14 motion is moot because that deadline has already passed.

15 We would certainly oppose any extension at this
16 point, as I've already discussed.

17 The second relief that they sought in that
18 motion was a continuance of the date to submit dispositive
19 motions to this Court.

20 We stipulated that that would be done by this
21 Friday, December 15th. We did that very deliberately,
22 because we looked at the calendar and saw where these were
23 going to fall with the Christmas holiday. We knew that we
24 were filing some significant dispositive motions so we

1 built in 45 days before trial instead of 30.

2 We did that with much thought and intent to try
3 to give this Court adequate time to consider the motions.
4 We would oppose any extension to that submission deadline
5 which the parties stipulated to last February.

6 THE COURT: So I want to hear from you, Counsel.
7 Tell me why I don't have oppositions.

8 MR. MOQUIN: Your Honor, early morning of the
9 date that my oppositions to these two motions were due, the
10 application that I was writing them in, it just -- it just
11 hung.

12 And so I killed it and started it up again. It
13 would not let me save what I had done. So I killed it
14 again. And everything was gone. I lost three weeks' worth
15 of work.

16 So I contacted opposing counsel, and given the
17 fact that I had extended a seven-day extension for them to
18 respond to our motion for summary judgment, I was hoping
19 that they would reciprocate. And they only gave me one
20 day.

21 I did what I could, and the following day said,
22 you know, I just haven't been able to, to make this up.

23 And that continued through that Wednesday.
24 Wednesday morning I asked for another extension, and I was

1 granted, at 11:00 o'clock, until 5:00, I believe -- no,
2 3:00 o'clock. And so I filed this motion for, for an
3 extension of time.

4 Meanwhile, my computer system, my primary
5 computer system has been just a nightmare. And I've been
6 migrating all of my assets off of it with respect to this
7 case so that I can continue to work.

8 But that is the sole and, and just debilitating
9 cause of the --

10 THE COURT: So do you have IT people working on
11 it?

12 MR. MOQUIN: I'm solo.

13 THE COURT: Okay. All right.

14 So the -- I was just trying to pull up your
15 motion again, because I think I left it on my desk.

16 So the time frame you want at this juncture?

17 MR. MOQUIN: For oppositions?

18 THE COURT: Yes.

19 MR. MOQUIN: If I could have -- my, my replies
20 to plaintiffs' motion for summary judgment are due on
21 Friday. If I could have until this coming Monday, that
22 would be ideal. Otherwise, I would be grateful for Friday.

23 THE COURT: All right. And specifically that is
24 on the three motions that I mentioned.

1 MR. O'MARA: The oppositions, your Honor, right?

2 THE COURT: Right. On the three motions that I
3 mentioned that you wanted to file the opposition. That's
4 the motion to strike filed on 1/14. 11/15, motion for
5 partial summary judgment. And 11/15/2017, motion for
6 sanctions.

7 All right. If I were to grant an extension, and
8 I know this will make you unhappy, but if I were to, how
9 much time would you want to file a reply?

10 MR. IRVINE: Well, your Honor, that's where the
11 trouble comes in and why we did the 45 days.

12 If we get oppositions on Monday, then, you know,
13 the following week you're into the Christmas holiday and
14 everything else. I'm not even sure when -- you'd have four
15 days. I mean --

16 THE COURT: Monday would be the 18th.

17 MR. IRVINE: Right.

18 THE COURT: And the 22nd is right before the
19 holidays.

20 Now I took that following week off.

21 MR. IRVINE: I'm back East on a vacation that
22 week myself, your Honor. I won't be back until the 4th.

23 THE COURT: And it was purposeful because I saw
24 all the documents. So I'm hoping to get caught up with

1 reading all the documents.

2 MR. IRVINE: I think the effect of an extension
3 through Monday, we would need, you know, a decent amount of
4 time. We'd have to be looking at the week of the 8th to
5 file our replies. I don't see how we could get it done
6 before then.

7 THE COURT: Well, when are you departing?

8 MR. IRVINE: I'm leaving the 26th, and I'll be
9 back on the 4th. I'm leaving for the East Coast.

10 THE COURT: Okay.

11 MR. IRVINE: The other complicating factor is I
12 have a very significant set of Ninth Circuit briefing that
13 is due on the 28th, which is going to take all my time
14 basically between now and then, for the most part.

15 So I'm pretty jammed up, which is why we hoped
16 to have everything done by the 15th.

17 THE COURT: I understand.

18 MR. IRVINE: Again, respectfully, in response to
19 what Mr. Moquin is saying, I can buy what he's saying, but
20 if you look at the motion for sanctions, this is a part of
21 a very significant repeated behavior.

22 We've had to file multiple motions to compel in
23 this case, because they won't provide us with basic
24 discovery information.

1 When we file those motions to compel, they
2 simply don't oppose them. And then we have to get orders
3 from this Court and go and enforce those.

4 We were here almost 11 months ago to the day,
5 and I was standing in Court explaining to your Honor that
6 we hadn't received damages disclosures from them; that we
7 hadn't received an appropriate disclosure for Mr. Gluhaich.
8 They stipulated to that, but they haven't done their job on
9 those two issues.

10 We have a stip and order, it was entered by this
11 court. It set forth very specific deadlines and a very
12 specific approach to how we were going to handle the rest
13 of the case.

14 Lo and behold in October, we still don't have
15 damages disclosures. We still haven't seen anything from
16 Gluhaich. And we get summary judgment motions from
17 plaintiff where they seek three times the amount of damages
18 than we've ever seen before.

19 So I'm sensitive to any computer issues and
20 problems counsel has, but this is simply part of a very
21 consistent pattern of behavior. That's why we think the
22 case should be dismissed.

23 I just, these motions are very important to my
24 client, and I want your Honor to have the appropriate time

1 to look at them. We need to have time to do our replies.

2 I don't know what the solution is. I'm just
3 strongly opposed to any continuances from here on out.

4 THE COURT: I'm not inclined to continue the
5 trial, number one.

6 Two, it's the seriousness of the relief, which
7 is substantial, and my serious consideration of imposing
8 sanctions.

9 So I am going to allow you to file oppositions
10 and I will tell you why. We had the very same thing happen
11 this week on a document. My law clerk did. And we could
12 not recover it.

13 And so that's the only reason that -- but I
14 appreciate defendant's extreme frustration. And you need
15 to know going into these oppositions, that I'm very
16 seriously considering granting all of it. And they have
17 been beyond courteous to you.

18 So you will have until Monday, the 18th, to file
19 any papers, any oppositions, and they must be filed by
20 10:00 a.m.

21 MR. MOQUIN: Thank you, your Honor.

22 THE COURT: Now I want to accommodate, which is
23 just a hard schedule for all of us. You have your Ninth
24 Circuit argument on the 28th, did you say?

1 MR. IRVINE: I have two Ninth Circuit briefs due
2 on the 28th.

3 THE COURT: Wouldn't it be better for you to
4 have your replies due on the 22nd, or for me to extend it
5 out? I mean, my intention is to get the motion and the
6 opposition all read and outlined so that I only need to
7 look at your reply.

8 MR. IRVINE: Okay.

9 THE COURT: It would be easier if it was not
10 excessively long for the reply.

11 MR. IRVINE: We'll keep that in mind, your
12 Honor.

13 THE COURT: So I'll give you whatever time you
14 need. And what that means is I'll be a bit jammed up, but
15 we'll do it.

16 MR. O'MARA: Why don't you give them until the
17 8th, and they can file it, and that gives them plenty of
18 time. And if they get it done beforehand, they can file it
19 beforehand. That way if something happens with Brian and
20 his travels or whatever, I mean --

21 THE COURT: And what I would like you to do --

22 MR. IRVINE: I'm sorry to interrupt. Your
23 Honor, we'll certainly get at least one of our replies
24 filed by the 22nd, because it's the one that I'm going to

1 be primarily writing, and I'm going to do that before I
2 go --

3 THE COURT: Okay.

4 MR. IRVINE: -- on my trip.

5 THE COURT: Okay.

6 MR. IRVINE: And that will be the motion to
7 strike. That one will definitely be submitted --
8 resubmitted, I guess, by the 22nd.

9 Ms. Webster was primarily responsible for the
10 other two briefs. And she's got another appeal that I
11 didn't mention to you in the Sixth Circuit that she's got
12 working as well. So I think we're going to need to ask for
13 the Court's indulgence for the other two.

14 THE COURT: That's fine. These are very
15 significant motions. There's a lot to read. And I have
16 outlined a couple of areas of our own research I want to
17 do. So I will give you until the 8th.

18 Now let's set a date for oral arguments.

19 I had a three-week trial starting on the 8th,
20 but I'm somewhat remembering that they may be just now
21 talking about either it's going to shorten up or they're
22 going to ask for a continuance.

23 So do you have any hearing dates? I think we
24 need allow some significant argument time.

1 MR. O'MARA: Your Honor, if you're talking about
2 the 8th, 9th, we are trying to schedule settlement that
3 week.

4 THE COURT: On this case?

5 MR. O'MARA: And I don't know if it's been
6 revoked because they may do that.

7 MR. IRVINE: It hasn't been revoked. But I
8 don't think those dates are magic. We're trying to
9 schedule mediation with retired Judge Adams, and he was
10 generally available those first two weeks. So I'd rather
11 get an oral argument date that works for you, and we'll
12 figure out a settlement conference date.

13 THE COURT: And you want it while the motions
14 are pending, or decided, after oral arguments?

15 MR. IRVINE: The settlement conference?

16 THE COURT: Right. Right, there would be no
17 need for one --

18 MR. IRVINE: Right.

19 THE COURT: -- if I roll one way.

20 MR. IRVINE: Right.

21 MR. MOQUIN: Or there would be no need for oral
22 argument if we could settle.

23 THE COURT: Right.

24 MR. IRVINE: True.

1 THE COURT: So what do we have?

2 THE CLERK: We have the afternoon of the 18th.

3 THE COURT: That's close to trial.

4 What do we have on the 12th?

5 THE CLERK: That would just be the end of that
6 first week of a three-week trial. Nothing else is set that
7 day.

8 THE COURT: I have two trials behind that
9 three-week trial, though.

10 So going back to the, if we have a trial
11 starting on the 29th, you're still expecting it to be eight
12 days, correct?

13 MR. O'MARA: I think maximum.

14 THE COURT: Okay. Let's go backwards from
15 there.

16 THE CLERK: Okay. The week of the 8th you only
17 have the one.

18 THE COURT: So the other went off?

19 THE CLERK: (Nods head.)

20 THE COURT: Okay. So we could do it on the
21 12th, correct?

22 THE CLERK: Yes.

23 MR. O'MARA: That's just the day we were trying
24 to find, but I mean, I think defendants are really going to

1 be the ones that push the settlement date. So if they want
2 to do it after --

3 MR. IRVINE: The 12th is fine for us.

4 THE COURT: So then you would be -- okay.

5 So how much time do you think you need?

6 Generally, I mean, because I have extra time now
7 with this. I'm going to have my outline done, and I will
8 have very specific questions, and I will have the
9 opportunity to check all the case law. And then we'll do
10 our own independent research.

11 And so I expect to allow you to do your initial
12 presentations, but I'll probably interrupt you and go right
13 to questioning. Okay?

14 MR. O'MARA: Are you planning on having the
15 whole day, your Honor, and we just schedule it at 9:00
16 a.m., or do you want to start at 1:00 and go to 4:00?

17 THE COURT: What works better?

18 THE CLERK: We can start at 1:00.

19 THE COURT: Either one. Whatever you would
20 like.

21 Do you have a preference?

22 MR. IRVINE: I can't imagine that the argument
23 will take a whole day. I think three hours is probably
24 ample.

1 THE COURT: Okay.

2 MR. MOQUIN: Your Honor, the only issue I have
3 is I will be driving from San Jose, as I did this morning.
4 So it would be more convenient for me if it was this time
5 or later.

6 MR. O'MARA: So 1:00?

7 MR. MOQUIN: 1:00 would be great.

8 MR. O'MARA: Is that okay, Mr. Irvine?

9 MR. IRVINE: Sure. I'm free the whole day.

10 THE COURT: 1:00.

11 MR. MOQUIN: This would be on all five pending
12 motions?

13 THE COURT: Yes, it's going to be on everything
14 that is outstanding.

15 Now, in light of the fact that we set that on
16 the 12th, and you will have your oppositions, your replies
17 done by the 8th, that should give us enough time.

18 Does that give you enough time between filing
19 your replies and argument?

20 MR. IRVINE: Sure.

21 THE COURT: Okay. All right.

22 And will you be arguing all the motions, or will
23 you be splitting them?

24 MR. MOQUIN: I'll be doing them all.

1 MR. IRVINE: We'll being splitting them.

2 THE COURT: Okay.

3 MR. IRVINE: I know Ms. Webster will take at
4 least one of the briefs.

5 THE COURT: Okay. All right.

6 I will tell you this. This is it for
7 extensions. All right. And, and there will be no more.

8 And you know going into this motion for
9 sanctions that you're -- I haven't decided it, but I need
10 to see compelling opposition not to grant it. Okay.

11 MR. MOQUIN: I understand.

12 THE COURT: Anything else we need to do today?

13 MR. IRVINE: I don't think so, your Honor.
14 Thank you.

15 THE COURT: Okay. Thank you.

16 We'll be in recess.

17 MR. O'MARA: I'm sorry, your Honor.

18 Could you just restate when you want the trial
19 statements, or will you just --

20 THE COURT: Isn't it in our scheduling order?

21 MR. IRVINE: It is. Five judicial days from the
22 29th.

23 THE COURT: Yes. Where did I put my outline?

24 And you should be aware that I may ask for

1 follow-up briefing during the trial since it's a bench
2 trial, and there are specific areas that I want briefing
3 on.

4 But it is five days before trial. It's always
5 welcome if it comes a little early. But that is your
6 deadline.

7 And you do know that pursuant to local rules, or
8 the applicable rules, that you must submit proposed
9 findings with your trial statement on a bench trial.

10 MR. O'MARA: Okay.

11 THE COURT: Okay. All right.

12 We'll be in recess.

13 MR. MOQUIN: Thank you, your Honor.

14 THE COURT: Thank you, Counsel.

15 MR. IRVINE: Thank you, your Honor.

16 MS. WEBSTER: Thank you.

17 MR. O'MARA: Thank you, your Honor.

18
19 (Whereupon the proceedings were
20 concluded.)

21 -oOo-
22
23
24

1 STATE OF NEVADA)
) ss.
2 WASHOE COUNTY)

3
4 I, DEBORA L. CECERE, an Official Reporter of
5 the State of Nevada, in and for Washoe County, DO HEREBY
6 CERTIFY:

7 That I was present at the times, dates, and
8 places herein set forth, and that I reported in shorthand
9 notes the proceedings had upon the matter captioned within,
10 and thereafter transcribed them into typewriting as herein
11 appears;

12 That the foregoing transcript, consisting of
13 pages 1 through 28, is a full, true and correct
14 transcription of my stenotype notes of said proceedings.

15 DATED: At Reno, Nevada, this 14th day of
16 December, 2017.

17
18
19 /s/ Debora Cecere

20 _____
 DEBORA L. CECERE, CCR #324
21
22
23
24

EXHIBIT 5

EXHIBIT 5

**Brian P Moquin - #257583****Current Status: Active**

This attorney is active and may practice law in California.

See below for more details.

Profile Information

The following information is from the official records of The State Bar of California.

| | | | |
|----------------------|--------------------------------|------------------------------|-------------------------------------|
| Bar Number: | 257583 | | |
| | Law Offices of Brian P. Moquin | Phone Number: | (408) 460-7787 |
| | 1250 Oakmead Pkwy | | |
| Address: | Ste 210 | Fax Number: | (408) 843-1678 |
| | Sunnyvale, CA 94085-4035 | | |
| | Map it | | |
| Email: | bmoquin@lawprism.com | | |
| County: | Santa Clara | Undergraduate School: | Penn State Univ; University Park PA |
| District: | District 6 | | |
| CLA Sections: | None | Law School: | Concord Law School; Los Angeles CA |

California Lawyers Association (CLA) is an independent organization and is not part of The State Bar of California.

Status History

| Effective Date | Status Change |
|----------------|-----------------------------------------|
| Present | Active |
| 11/3/2008 | Admitted to The State Bar of California |

Actions Affecting Eligibility to Practice Law in California**Disciplinary and Related Actions**

This member has no public record of discipline.

Administrative Actions

This member has no public record of administrative actions.

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EXHIBIT 4

EXHIBIT 4

1 IN THE SECOND JUDICIAL DISTRICT COURT
2 OF THE STATE OF NEVADA
3 IN AND FOR THE COUNTY OF WASHOE

4 ---o0o---

5
6 LARRY J. WILLARD, individually
7 and as trustee of the Larry
8 James Trust Fund; OVERLAND
9 DEVELOPMENT CORPORATION, a
10 California corporation;
11 et al.,

12 Plaintiffs,

13 vs.

Case No. CV14-01712

14 BERRY-HINCKLEY INDUSTRIES,
15 a Nevada corporation; and
16 JERRY HERBST, an individual,

Dept. No. 6

17 Defendants.

18 _____
19 And Related Counterclaim.

20 _____/

21 DEPOSITION OF LARRY WILLARD

22 AUGUST 21, 2015

23 RENO, NEVADA

24 Reported by:

JULIE ANN KERNAN, CCR #427, RPR

25 MOLEZZO REPORTERS (775) 322-3334

1 APPEARANCES

2 For the Plaintiffs: LAW OFFICES OF BRIAN P. MOQUIN
3 By: Brian P. Moquin, Esq.
3506 La Castellet Court
4 San Jose, California 95148

5 For the Defendants: DICKINSON WRIGHT PLLC
6 Attorneys at Law
By: Brian R. Irvine, Esq.
7 By: Katy Brady, Esq.
100 West Liberty Street
8 Suite 940
Reno, Nevada 89501

1 Q All of them. Okay. Have you ever been deposed
2 in a case where you're not a party, just as a witness?

3 A Not to my recollection.

4 Q Okay. I want to move on and talk a bit about
5 kind of who you are.

6 A Okay.

7 Q If you could describe to me your post high
8 school education.

9 A I'm a graduate of Gilroy High School. I grew up
10 in Gilroy, the garlic capital. And then I went to Baylor
11 University.

12 Q Okay.

13 A I was there five years at Baylor. And that was
14 -- I graduated with a Bachelor of Arts in 19 -- I hate to
15 give you the year -- '65.

16 Q All right.

17 A And that's the extent of the education, formal
18 education.

19 Q Okay. And Bachelor of Arts in any specialty?

20 A Psychology, double major in psychology, general
21 business. Minors in music and religion.

22 Q Okay. And what did you do for a living? You're
23 retired, correct, just to back up?

24 A I'm trying to be.

25 Q Trying to be retired, okay. Before you tried to

1 be retired, what did you -- how would you describe how you
2 made a living.

3 A Primarily in real estate development. My father
4 was a contractor in the Gilroy, South Santa Clara County.
5 Talked me into coming into business with him as opposed to
6 going into another field.

7 Q When did you go into business with your dad?

8 A I worked with my father from 1965 to about '69.

9 Q Okay. And after '69 did you go --

10 A On my own.

11 Q Okay. You formed a company and started doing
12 real estate development by yourself?

13 A Yes, I did.

14 Q Okay. And how long did you continue in that
15 line of work?

16 A Real estate development until maybe 2005 or six,
17 thereabouts, with the last project I did, I think, was in
18 2000 -- yeah, 2000 -- 2005.

19 Q And when you say "real estate development," I
20 know that can sort of encompass a broad spectrum.

21 A It does.

22 Q And what type of real estate development did you
23 do? I know that's a broad question and it's intentionally
24 so.

25 A Residential development.

1 Q Residential. Okay. Single family homes?

2 A Yes.

3 Q Any commercial real estate development?

4 A A little.

5 Q What type of projects on the commercial side?

6 A Strip -- couple strip centers, an office
7 building, and a mini-storage facility.

8 Q And this development you're talking about,
9 whether it's the residential or the commercial side, was
10 this all in the, I'll call it, the South Bay area? I know
11 that's not exactly right, but --

12 A Yes.

13 Q -- is it all in that area?

14 A Yes.

15 Q Okay. And in the scope of your work as a real
16 estate developer, did you obtain any licenses or
17 certifications?

18 A A B-1.

19 Q Okay. That's a builder's license?

20 A Yes, sir.

21 Q In California?

22 A In California.

23 Q Anything else?

24 A I had a real estate broker's license at one
25 time. It was primarily for my own development.

1 Q When did you obtain the contractor's license?

2 A Early '70's.

3 Q And did you hold that until 2005, 2006?

4 A Yes, sir.

5 Q Do you still have it?

6 A No.

7 Q What about the --

8 A Expired.

9 Q I'm sorry.

10 A I let it run its course.

11 Q What about the real estate broker's license,
12 when did you get that?

13 A It was 1972.

14 Q Do you still have that license?

15 A No.

16 Q When did that lapse or expire?

17 A Lapsed. About the same time frame.

18 Q Okay.

19 A I thought I was going to be retired.

20 Q Okay. Any other licenses or certifications
21 associated with your work?

22 A No, sir.

23 Q Okay. You said you're trying to be retired.
24 Are you currently doing any work?

25 A No. Social Security only.

1
2
3 ---o0o---

4 CERTIFICATE OF WITNESS

5
6 I hereby certify under penalty of perjury
7 that I have read the foregoing deposition, made the
8 changes and corrections that I deem necessary, and
9 approve the same as now true and correct.

10
11 Dated this _____ day of _____,
12 2015.

13
14
15 _____
16 LARRY WILLARD
17
18
19
20
21
22
23
24
25

1 STATE OF NEVADA)

2 COUNTY OF WASHOE)

3 I, JULIE ANN KERNAN, a notary public in and
4 for the County of Washoe, State of Nevada, do hereby
5 certify:

6 That on Friday, the 21st day of August, 2015,
7 at the hour of 9:28 a.m. of said day, at the Law Offices of
8 Dickinson Wright, 100 West Liberty Street, Suite 940, Reno,
9 Nevada, personally appeared LARRY WILLARD, who was duly
10 sworn by me to testify the truth, the whole truth, and
11 nothing but the truth, and thereupon was deposed in the
12 matter entitled herein;

13 That said deposition was taken in verbatim
14 stenotype notes by me, a Certified Court Reporter, and
15 thereafter transcribed into typewriting as herein appears;

16 That the foregoing transcript, consisting of
17 pages numbered 1 through 137, is a full, true and correct
18 transcript of my said stenotype notes of said deposition to
19 the best of my knowledge, skill and ability.

20
21 DATED: At Reno, Nevada, this 24th day of August, 2015.

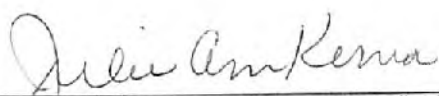
22
23 
24 JULIE ANN KERNAN, CCR #427
25

EXHIBIT 6

EXHIBIT 6

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 2 DAVID C. O'MARA, ESQ.
 3 NEVADA BAR NO. 8599
 4 311 East Liberty Street
 5 Reno, Nevada 89501
 6 Telephone: 775/323-1321
 7 Fax: 775/323-4082

8 BRIAN P. MOQUIN, ESQ.
 9 Admitted *Pro Hac Vice*
 10 CALIFORNIA BAR NO. 247583
 11 LAW OFFICES OF BRIAN P. MOQUIN
 12 3506 La Castellet Court
 13 San Jose, CA 95148
 14 Telephone: 408.300.0022
 15 Fax: 408.843.1678
 16 bmoquin@lawprism.com

17 *Attorneys for Plaintiffs*

18 LARRY J. WILLARD, OVERLAND
 19 DEVELOPMENT CORPORATION,
 20 EDWARD C. WOOLEY, and JUDITH A. WOOLEY

21 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
 22 **IN AND FOR THE COUNTY OF WASHOE**

23 LARRY J. WILLARD, individually and as
 24 trustee of the Larry James Willard Trust Fund;
 25 OVERLAND DEVELOPMENT
 26 CORPORATION, a California corporation;
 27 EDWARD C. WOOLEY AND JUDITH A.
 28 WOOLEY, individually and as trustees of the
 Edward C. Wooley and Judith A. Wooley
 Intervivos Revocable Trust 2000,

Plaintiffs,

v.

BERRY-HINCKLEY INDUSTRIES, a
 Nevada corporation; JERRY HERBST, an
 individual; and JH, INC., a Nevada
 corporation,

Defendants.

Case No. CV14-01712

Dept. No. 6

PLAINTIFFS' INITIAL 16.1
PRODUCTION OF DOCUMENTS AND
LIST OF WITNESSES

1 COME NOW Plaintiffs, by and through undersigned counsel, and, pursuant to NRCP
2 16.1, herewith produce the following documents and list of witnesses:

3
4 **A. DOCUMENTS**

5 1. Virginia Avenue Lease Agreement dated December 2, 2005, Bates Stamp Nos.
6 LJW000001-LJW000035.

7 2. Virginia Avenue Lease Extension Option dated January 18, 2006, Bates Stamp
8 Nos. LJW000036-LJW000076.

9 3. Virginia Avenue Deed of Trust dated January 25, 2006, Bates Stamp
10 LJW000077-LJW000081.

11 4. Virginia Avenue Purchase Deed of Trust dated March 28, 2006, Bates Stamp
12 Nos. LJW000082-LJW000106.

13 5. Herbst Proposal dated February 17, 2007, Bates Stamp Nos. LJW000107-
14 LJW000121.

15 6. Virginia Avenue Amendment to Lease dated March 9, 2007, Bates Stamp Nos.
16 LJW000122-LJW000126.

17 7. Herbst Guaranty for Virginia Avenue Property dated March 9, 2007, Bates
18 Stamp Nos. LJW000127-LJW000130.

19 8. Letter from Sam Chuck to Yalamanchili dated March 19, 2007, Bates Stamp
20 Nos. LJW000131-LJW000179.

21 9. Deed of Trust dated June 29, 2007, Bates Stamp Nos. LJW000180-LJW000211.

22 10. Complaint in *Willard v. Morabito*, Bates Stamp Nos. LJW000212-LJW000225.

23 11. Deed of Trust dated March 28, 2008, Bates Stamp Nos. LJW000226-
24 LJW000250.

25 12. BHI Financials for FY2012, Bates Stamp Nos. LJW000251-LJW000253.

26 13. Business Partners March 2013 Statement, Bates Stamp No. LJW000254.

27 14. Letter from Gordon to Goldblatt dated March 18, 2013, Bates Stamp Nos.
28 LJW000255-LJW000256.

- 1 15. Letter from Gordon to Goldblatt dated March 28, 2013, Bates Stamp Nos.
2 LJW000257-LJW000258.
- 3 16. Letter from Gordon to Goldblatt dated April 12, 2013, Bates Stamp Nos.
4 LJW000259-LJW000260.
- 5 17. Interim Operating and Management Agreement, Bates Stamp Nos. LJW000261-
6 LJW000264.
- 7 18. Willard Notice of Chapter 11 Bankruptcy, Bates Stamp Nos. LJW000265-
8 LJW000267.
- 9 19. Declaration of REO Manager, Business Partners, Bates Stamp Nos.
10 LJW000268-LJW000278.
- 11 20. Motion by NCUAB, Bates Stamp Nos. LJW000279-LJW000284.
- 12 21. Declaration of Larry J. Willard to Dismiss Bankruptcy, Bates Stamp Nos.
13 LJW000285-LJW000288.
- 14 22. Letter from Desmond to Goldblatt, Bates Stamp Nos. LJW000289-LJW000293.
- 15 23. Notice of Intent to Foreclose, Bates Stamp Nos. LJW000294-LJW000296.
- 16 24. Real Estate Report for 7693 S. Virginia Avenue, Bates Stamp Nos. LJW000297-
17 LJW000331.
- 18 25. Purchase and Sale Agreement, Bates Stamp Nos. LJW000332-LJW000337.
- 19 26. Closing Statement, Bates Stamp No. LJW000338.
- 20 27. Nevada Energy Invoices Facimile, Bates Stamp Nos. LJW000339-LJW000352.
- 21 28. Nevada Energy Screenshots of Usage for BHI, Bates Stamp Nos. LJW000353-
22 LJW000355.
- 23 29. Letter from Desmond to Moquin dated July 16, 2004, Bates Stamp Nos.
24 LJW000356-LJW000389.
- 25 30. Baring Blvd. Purchase Agreement, Bates Stamp Nos. ECW000001-
26 ECW000022.
- 27 31. Baring Blvd. Lease Agreement, Bates Stamp Nos. ECW000023-ECW000057.
- 28 32. Baring Blvd. Note, Bates Stamp Nos. ECW000058-ECW000092.

- 1 32. Baring Blvd. Amendment to Lease, Bates Stamp Nos. ECW000093-
2 ECW000099.
- 3 33. Herbst Guaranty for Baring Blvd. Property, Bates Stamp Nos. ECW000100-
4 ECW000103.
- 5 34. Assignment of Baring Blvd. Lease to Jackson Foods, Bates Stamp Nos.
6 ECW000104-ECW110.
- 7 35. Letter from Jackson Foods dated April 2, 2013, Bates Stamp Nos. ECW000111-
8 ECW000112.
- 9 36. Letter from Jackson Foods dated May 20, 2013, Bates Stamp No. ECW000113.
- 10 37. Settlement Statement on Baring Blvd. Property, Bates Stamp Nos. ECW000114-
11 ECW000115.
- 12 38. Highway 50 Purchase Agreement, Bates Stamp Nos. ECW002001-ECW002013.
- 13 39. Highway 50 Lease Agreement, Bates Stamp Nos. ECW002014-ECW002056.
- 14 40. Highway 50 Amendment to Lease, Bates Stamp Nos. ECW002057-
15 ECW002063.
- 16 41. Herbst Guaranty for Highway 50 Property, Bates Stamp Nos. ECW002064-
17 ECW002067.
- 18 42. Highway 50 Memorandum of Lease, Bates Stamp Nos. ECW002068-
19 ECW002070.
- 20 43. Letter from Sam Chuck dated February 29, 2008, Bates Stamp nos.
21 ECW002071-ECW002075.
- 22 44. Highway 50 Second Amendment to Lease, Bates Stamp Nos. ECW002076-
23 ECW002077.
- 24 45. BHI Sublease to Little Caesars, Bates Stamp Nos. ECW002078-ECW002096.
- 25 46. Letter from McDade to Gluhaich dated October 17, 2012, Bates Stamp Nos.
26 ECW002097-ECW002101.
- 27 47. Letter from Desmond to Goldblatt dated June 3, 2013, Bates Stamp No.
28 ECW002102.

1 48. Letter from Desmond to Zlotoff, Bates Stamp Nos. ECW2103-ECW002104.

2 49. E-mail from Baron to Wooley dated January 21, 2014, Bates Stamp No.
3 ECW002105.

4 50. E-mail from Baron to Wooley dated April 17, 2014, Bates Stamp Nos.
5 ECW002106-ECW002107.

6 **B. LIST OF WITNESSES**

7
8 1. Plaintiff Larry J. Willard, c/o David C. O'Mara, Esq., The O'Mara Law Firm,
9 311 E. Liberty Street, Reno, NV 89501; tel. 775.323.1321.

10 2. Plaintiff Edward C. Wooley, c/o David C. O'Mara, Esq., The O'Mara Law
11 Firm, 311 E. Liberty Street, Reno, NV 89501; tel. 775.323.1321.

12 3. Plaintiff Judith A. Wooley, c/o David C. O'Mara, Esq., The O'Mara Law Firm,
13 311 E. Liberty Street, Reno, NV 89501; tel. 775.323.1321.

14 4. Defendant Jerry Herbst, c/o John P. Desmond, Esq., Gordon Silver, 100 W.
15 Liberty Street, Suite 940, Reno, NV 89501; tel. 775.343.7505.

16 5. Timothy P. Herbst, Berry-Hinckley Industries, 425 Maestro Drive, Suite 200,
17 Reno, NV 89511; tel. 775.689.1222.

18 6. Troy D. Herbst, Berry-Hinckley Industries, 425 Maestro Drive, Suite 200, Reno,
19 NV 89511; tel. 775.689.1222.

20 7. Daniel Gluhaich, 175 E. Main Ave., Suite 130, Morgan Hill, CA 95037; tel.
21 408.201.0120

22 8. Paul A. Morabito, 8581 Santa Monica Blvd., Suite 708, West Hollywood, CA
23 90069; telephone number unknown.

24 9. Terrilyn Baron, MUFJ Union Bank, N.A., 30343 Canwood Street, Suite 100,
25 Agoura Hills, CA 91301; tel. 818.865.3236.

26 10. Stephen J. Morse, Retail Petroleum Consultants, Inc., 4565 Costa De Oro,
27 Oxnard, CA 93035; tel. 805.815.4350.

28 11. Mike Burns, Business Partners, LLC, 20131 Prairie Street, 2nd Floor,

1 Chatsworth, CA 91311; tel. 818.836.6323.

2 12. John D. Jackson, Jackson Food Stores, Inc., 3450 E. Commercial Court,
3 Meridian, ID 83642; tel. 208.888.6061.

4 13. Gerald Gordon, Esq., Gordon Silver, 3960 Howard Hughes Parkway, Ninth
5 Floor, Las Vegas, NV 89169; tel. 702.796.5555.

6 14. Stanley A. Zlotoff, Esq., Bluer & Zlotoff Law Offices, 300 S. 1st Street # 215,
7 San Jose, CA 95113; tel. 408.287.5087.

8 15. L. Steven Goldblatt, Esq., 22 Martin Street, Gilroy, CA 95020; tel.
9 408.848.4396.

10 16. Samuel A. Chuck, Esq., Rossi, Hammerslough, Reischl & Chuck, 1960 The
11 Alameda, Suite 200, San Jose, CA 95126; tel. 408.261.4252.

12 17. Sujata Yalamanchili, Esq., Hodgson Russ LLP, One M&T Plaza, Suite 2000,
13 Buffalo, NY 14203; tel. 716.848.1657.

14 Plaintiff hereby reserves the right to supplement this 16.1 production and list of
15 witnesses as additional information becomes available through discovery.

16 **AFFIRMATION**

17 (Pursuant to NRS 239B.030)

18 The undersigned does hereby affirm that the preceding document filed in the above
19 referenced matter does not contain the Social Security Number of any person.

20 THE O'MARA LAW FIRM, P.C.

21 DATED: December 12, 2014

22 
23 DAVID C. O'MARA, ESQ.

I hereby certify that I am an employee of The O'Mara Law Firm, P.C., 311 E. Liberty Street, Reno, Nevada 89501, and on this date I served a true and correct copy of the foregoing document on all parties to this action by personal delivery to the addressed as follows:

John Desmond, Esq.
100 W. Liberty St., Ste. 940
Reno, NV 89501
Telephone: 775.343.7500
Fax: 775.786.0131
DATED: December 12, 2014

Daniella

CODE: 3785

Richard D. Williamson, Esq., SBN 9932
Jonathan Joel Tew, Esq., SBN 11874
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Telephone: (775) 329-5600
Facsimile: (775) 348-8300
Attorneys for Plaintiffs/Counterdefendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as
Trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
CORPORATION, a California corporation;
EDWARD E. WOOLEY AND JUDITH A.
WOOLEY, individually and as trustees of the
Edward C. Wooley and Judith A. Wooley
Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation; and JERRY HERBST, an
individual

Defendants.

Case No. CV14-01712

Dept. No. 6

BERRY-HINCKLEY INDUSTRIES a Nevada
corporation; and JERRY HERBST,
an individual,

Counterclaimants,

vs.

LARRY J. WILLARD, individually and as
Trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
CORPORATION, a California corporation,

Counterdefendants.

REPLY IN SUPPORT OF THE WILLARD PLAINTIFFS'

RULE 60(b) MOTION FOR RELIEF

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants oppose the Willard Plaintiffs' Rule 60(b) Motion for Relief ("Motion") on the primary grounds that Plaintiffs were somehow strategically trying to ambush Defendants and that the Willard Plaintiffs should be responsible for their lawyers' failures. Yet, what plaintiff would strategically fail to oppose dispositive motions? The Willard Plaintiffs have not strategically withheld anything. Rather, they had been following the advice of their lawyer, Brian Moquin. Unbeknownst to the Willard Plaintiffs, however, Mr. Moquin's life was in shambles, he was in violation of court rules, and his repeated assurances that the case was under control were false. Under controlling Nevada law, the Court should set aside its sanctions orders and allow this case to proceed toward a trial on the merits.

II. LEGAL ARGUMENT

A. Defendants Do Not Oppose, or Even Address, the Required Yochum Factors

The Nevada Supreme Court established several factors to consider in determining whether relief should be granted based upon excusable neglect, including: (1) a prompt motion for relief, (2) absence of an intent to delay; (3) lack of knowledge of the procedural requirements, and (4) good faith. Yochum v. Davis, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). Moreover, Rule 60(b) is guided by the state's "policy of resolving cases on their merits whenever possible." Stoecklein v. Johnson Elec., 109 Nev. 268, 274, 849 P.2d 305, 309 (1993).

The Willard Plaintiffs' Motion established all four Yochum factors, and also explained why their claims are meritorious. Thus, they have met their burden to show excusable neglect. By contrast, the Opposition did not even mention the Yochum factors or dispute the plaintiffs' meritorious claims. As those elements remain undisputed, the Court should grant the Motion.¹

Instead, Defendants solely focused on the evidence surrounding Mr. Moquin's condition. Not only does the admissible and undisputed evidence show that Mr. Moquin was suffering from

¹ In fact, as explained in the Willard Plaintiffs' concurrently-filed Opposition to Defendants' Motion to Exceed Page Limit, the Court should reject Defendants' entire nineteen-page Opposition to the Plaintiffs' Rule 60(b) Motion for Relief ("Opposition") because it fails to comply with this Court's Pretrial Order.

1 a serious mental health condition, which justifies relief here, but Defendants improperly moved
2 for case terminating sanctions without analyzing what role counsel's failures may have played.

3 The Nevada Supreme Court has required that "every order of dismissal with prejudice as
4 a discovery sanction be supported by an express, careful and preferably written explanation of
5 the court's analysis of the pertinent factors." Young v. Johnny Ribeiro Bldg., 106 Nev. 88, 93,
6 787 P.2d 777, 80 (1990). One of those required factors is "whether sanctions unfairly operate to
7 penalize a party for the misconduct of his or her attorney" Id. Yet, that required factor was
8 conspicuously absent from the defendants' motion for sanctions. Therefore, not only is it
9 appropriate to now consider whether the Sanctions Order unfairly penalizes the Willard Plaintiffs
10 for Mr. Moquin's misconduct, but the defendants' failure to advise the court of that authority and
11 discuss it in their motion for sanctions is another reason to set aside the Sanctions Order.

12 ***B. The Court Has Sufficient and Admissible Evidence to Establish Excusable Neglect***

13 The Motion included nine exhibits. Of these, Defendants only challenge exhibits 6, 7, 8,
14 and portions of exhibit 1. The other exhibits in support of the Motion are uncontested.

15 With respect to exhibit 1, Mr. Willard's declaration expressly declares that "under
16 penalty of perjury under the law of the State of Nevada that the foregoing is true and correct." A
17 declaration is admissible to the same extent as an affidavit. NRS 53.045. Exhibit 1 satisfies the
18 requirements of that statute. Therefore, it is admissible. Mr. Willard identified some matters
19 stated on information and belief, but also provided detail about facts in his personal knowledge.

20 Importantly, Mr. Willard also appropriately testifies to the fact that Mr. Moquin is
21 suffering from mental illness. Defendants' Opposition shows that Mr. Willard actually has a
22 degree in psychology. (Ex. 4 to Opp. at 13:19-20.) Regardless, however, lay witnesses can offer
23 testimony as to a person's sanity. Criswell v. State, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968)
24 (lay witness may give opinion of sanity); c.f. Carter v. U.S., 252 F.2d 608, 618 (D.C. Cir. 1957)).

25 Mr. Moquin's admission that he has bipolar disorder is also not hearsay. In Nevada, a
26 person's statement of his "then-existing state of mind, emotion, sensation or physical condition,
27 such as intent, plan, motive, design, mental feeling, pain and bodily health, is not inadmissible
28 under the hearsay rule." NRS 51.105(1). Defendants argue that the exception is limited to

1 statements about a present condition. Mr. Moquin's admissions that he has bipolar disorder are
 2 statements about his present condition. Therefore, all of the statements in Mr. Willard's
 3 declaration are admissible.²

4 Defendants next challenge Motion exhibits 6, 7, and 8 on the ground that they are not
 5 certified court records. Exhibit 6 is an Emergency Protective Order entered against Mr. Moquin.
 6 Exhibit 7 is a Pre Booking Information Sheet regarding Mr. Moquin. Exhibit 8 is a Request for
 7 Domestic Violence Restraining Order against Mr. Moquin.

8 Exhibits 6, 7, and 8 are authentic. That is apparent from Mr. Willard's declaration, the
 9 documents' appearance, and their surrounding characteristics. See, e.g., NRS 52.015(1);
 10 NRS 52.025; NRS 52.055. Moreover, if they truly doubted the documents' authenticity, then the
 11 Defendants could have provided some rebuttal "evidence or other showing sufficient to support a
 12 contrary finding." NRS 52.015(3). They did not do so.

13 Moreover, the records are not hearsay because they are not offered to prove the truth of
 14 the matter asserted, which is that Mr. Moquin abused his wife and children. Rather, they are
 15 offered to show that Mr. Moquin has very serious personal issues commanding his attention.
 16 Those issues, and the apparent turmoil in his life, caused Mr. Moquin to abandon the plaintiffs.
 17 Again, Defendants do not challenge that critical fact, other than to provide their own uncertified
 18 document stating that Mr. Moquin's bar license is still active. But Mr. Moquin's bar license is
 19 not the issue. Moreover, the best evidence of Mr. Moquin's failure to properly prosecute this
 20 case is capable of judicial notice: Mr. Moquin failed to file critical documents with the Court.
 21 Notably, the Court could likely witness Mr. Moquin's erratic and unreliable conduct for itself.

22 As the factually-uncontested evidence shows, Mr. Moquin was suffering from a
 23 psychological disorder that caused him to constructively abandon the case. Accordingly, the
 24 Court should find excusable neglect and grant the Willard Plaintiffs' relief from the Court's
 25 orders disposing of their claims.

26
 27 ² Defendants also point out that in some cases the moving party has provided declarations from the affected
 28 attorney and his physician. Yet, there is no requirement for a declaration from the attorney or his physician.
 Moreover, the Willard Plaintiffs repeatedly asked for those very items from Mr. Moquin. (See Exs. 6-10.)
 Unfortunately, he refused to comply and the Willard Plaintiffs have no ability to forcibly obtain those declarations.

C. The Willard Plaintiffs Had No Knowledge of Mr. Moquin's Condition

The Willard Plaintiffs did not know of Mr. Moquin's condition or its effect on the case. Defendants disingenuously contend that Mr. Willard "admits he was informed by Mr. O'Mara prior to the dismissal of his claims that Mr. Moquin was not responsive, but decided to do nothing about it due to financial reasons." (Opp. at 15:25-27.) This is demonstrably untrue. Defendants cite to paragraph 81 of Ex. 1 to the Motion, then fail to acknowledge the subsequent paragraphs, which discuss Mr. Willard's "almost daily efforts" to push the case forward, and Mr. Moquin's assurances that the case was proceeding fine.

Further, the Willard Plaintiffs did not discover that Mr. Moquin was bipolar until January 2018, which is when Mr. Moquin notified them of his condition. (Ex. 1 at ¶ 38.) Thus, the Willard Plaintiffs were effectively and unknowingly deprived of legal representation.

D. Local Counsel's Failure to Act Does Not Justify the Termination of the Case

Defendants claim that because Mr. O'Mara was required to actively participate in the case, Mr. Willard cannot demonstrate excusable neglect. Yet, Defendants can cite to no statute or case that suggests that local counsel's reliance on lead counsel's promises to handle critical oppositions prohibits a finding of excusable neglect.³ Indeed, Defendants' Opposition admits that Mr. O'Mara participated in the case and was similarly misled to some degree by Mr. Moquin's medical condition. (See Opp. at 18:18-24.) Mr. O'Mara's notice of withdrawal corroborates how Mr. Moquin's situation affected the case. (Ex. 11 at 1:23-26 (Mr. O'Mara "begged" Mr. Moquin to oppose the dispositive motions and Mr. Moquin assured him he would).)

E. Case-Terminating Sanctions Are Not Appropriate in this Case

"Because dismissal with prejudice is the most severe sanction that a court may apply . . . its use must be tempered by a *careful* exercise of judicial discretion." Hunter v. Gang, 123 Nev ___, ___, 377 P.3d 448, 455-56 (Nev. Ct. App. 2016) (citations omitted) (emphasis in original).

³ Indeed, the cases Defendants cite have nothing to do with excusable neglect. Gould v. Mitsui Min. & Selting Co., 738 F. Supp. 1121 (N.D. Ohio 1990) considered whether a law firm should be disqualified because it was representing a client in one matter and serving as local counsel against the client in another matter. In Duke Univ. v. Universal Prods., No. 1:13CV701, 2014 U.S. Dist. LEXIS 100868, at *1 (M.D.N.C. July 24, 2014), local counsel asked to be excused from attending a pretrial conference despite a rule requiring local counsel to appear. These cases are very different from this case. They also do not involve the equitable considerations mandated by Rule 60(b).

The Willard Plaintiffs did not engage in any willful misconduct. Their failures are the direct result of Mr. Moquin's mental illness. Moreover, Defendants have not demonstrated any material prejudice that justifies dismissing the case. Mr. Moquin's failures have caused extensive delay, but delay alone is not generally considered substantial prejudice. Lemoge v. United States, 587 F.3d 1188, 1196 (9th Cir. 2009).

Dismissal is too severe of a sanction under these facts. The undisputed evidence confirms that Defendants' deliberate breach of their lease financially destroyed the Willard Plaintiffs. Sanctions should punish the wrongdoer, and Mr. Moquin is responsible for the procedural problems in this case. See, e.g., Burkhart v. Philsco Prods. Co., 738 P.2d 433, 445 (Kan. 1987) ("sanctions directed to counsel rather than the plaintiff may have been entirely appropriate.").

The Nevada Supreme Court has repeatedly emphasized that cases should be adjudicated on the merits. Because of the excusable neglect created by Mr. Moquin, and the Defendants' readiness to defend the Willard Plaintiffs' rent-based damages, this Court should follow Nevada's policy and allow this case to proceed to trial.

In fact, the Nevada Supreme Court has noted that "fundamental notions of due process require that the discovery sanctions for discovery abuses be just and that the sanctions relate to the claims which were at issue in the discovery order which is violated." Young, 106 Nev. at 92, 787 P.2d at 779-80. As the defendants' primary complaint centers around the Willard Plaintiffs' diminution in value claims, those should be the only claims subject to sanctions. All other known and discovered damages should proceed to trial.

III. CONCLUSION

Brian Moquin's personal issues caused the problems in this case. Now, with new counsel, the case should proceed to a trial on the merits. Therefore, the Court should grant the Motion.

Dated this 29th day of May, 2018.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: /s/ Richard D. Williamson
Richard D. Williamson, Esq.
Jonathan J. Tew, Esq.
Attorneys for the Willard Plaintiffs

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm as follows with respect to the preceding document,
 REPLY IN SUPPORT OF THE WILLARD PLAINTIFFS' RULE 60(b) MOTION FOR
 RELIEF filed in case number CV14-01712:

☒ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

 (State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
 (NRS 125.130, NRS 125.230 and NRS 125B. 055)

Date: May 29, 2018

Richard D. Williamson
 (Signature)

Richard D. Williamson, Esq.
 (Print Name)

Plaintiffs
 (Attorney for)

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 29th day of May, 2018, I electronically filed the foregoing **REPLY IN SUPPORT OF THE WILLARD PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF** with the Clerk of the Court by using the ECF system which served the following parties electronically:

John P. Desmond, Esq.
Brian R. Irvine, Esq.
Anjali D. Webster, Esq.
Dickinson Wright
100 West Liberty Street, Suite 940
Reno, NV 89501
Attorneys for Defendants/Counterclaimants

/s/ Kimberlee Hill

An Employee of Robertson, Johnson, Miller & Williamson

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EXHIBIT “1”

EXHIBIT “1”

CODE: 1520
 Richard D. Williamson, Esq., SBN 9932
 Jonathan Joel Tew, Esq., SBN 11874
 ROBERTSON, JOHNSON, MILLER & WILLIAMSON
 50 West Liberty Street, Suite 600
 Reno, Nevada 89501
 Telephone: (775) 329-5600
 Facsimile: (775) 348-8300
*Attorneys for Plaintiffs Larry J. Willard,
 individually and as Trustee of the
 Larry James Willard Trust Fund, and
 Overland Development Corporation*

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as
 Trustee of the Larry James Willard Trust Fund;
 OVERLAND DEVELOPMENT
 CORPORATION, a California corporation;
 EDWARD E. WOOLEY AND JUDITH A.
 WOOLEY, individually and as trustees of the
 Edward C. Wooley and Judith A. Wooley
 Intervivos Revocable Trust 2000,

Case No. CV14-01712

Dept. No. 6

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada
 corporation; and JERRY HERBST, an
 individual

Defendants.

AND ALL RELATED MATTERS.

DECLARATION OF LARRY J. WILLARD IN RESPONSE TO

DEFENDANTS' OPPOSITION TO RULE 60(b) MOTION FOR RELIEF

I, Larry J. Willard, hereby declare and state as follows:

1. As explained in my original Declaration of Larry J. Willard, dated April 18, 2018,
 I am the President, Chief Executive Officer, and sole Director of Overland Development
 Corporation, a California corporation ("Overland") and the trustee of the Larry James Willard
 Trust Fund.

1 2. I offer this supplemental declaration in response to the claims and arguments
2 made in the defendants' Opposition to Rule 60(b) Motion for Relief regarding lawyer Brian
3 Moquin's personal and mental problems.

4 3. As I had explained in my original declaration, "[i]f the court would like to review
5 the text messages that I exchanged with Brian, I am happy to provide those."

6 4. I was (and remain) concerned about sharing my correspondence with Mr. Moquin
7 on the record, but now feel that I have no choice but to ensure that the Court and the Defendants
8 at least see some examples of my attempts to remain engaged in this case while Mr. Moquin was
9 apparently allowing it to fall apart.

10 5. Therefore, I have attached some communications as a rebuttal to the opposition.
11 Moreover, as explained in our original motion, I also possess additional communications with
12 Mr. Moquin showing that the plaintiffs tried to be diligent in moving the case forward, but that
13 Mr. Moquin's admitted personal problems disrupted and severely harmed our ability to do that.

14 6. Edward Wooley, the other plaintiffs, and I retained Mr. Moquin in 2014 to
15 represent us in the lawsuit that our original attorney had filed.

16 7. At the time that we retained Mr. Moquin, he seemed to be a stable, accomplished
17 lawyer with no known record of any bar complaints, misconduct, or other causes for concern.

18 8. Upon reviewing Mr. Moquin's professional status and speaking to other people, I
19 believed that Mr. Moquin was qualified and would take this case very seriously.

20 9. Periodically I did get concerned with the slow pace of the litigation and the lack
21 of a resolution, but Mr. Moquin always had an explanation or "legal reasons" for any issues and
22 delays. He also frequently explained that the defendants' attorneys were the cause of the delay.

23 10. Mr. Moquin repeatedly assured us that he had everything under control and that
24 we would get a favorable result in the case.

25 11. In 2017, it became apparent to me that Mr. Moquin was having some financial
26 difficulties. However, he continued moving forward with this case and I did not know how
27 badly his personal life was affecting his work.

1 12. Mr. Moquin continued to assure me that he would be able to secure a large
2 judgment or settlement. Therefore, in mid-to-late 2017, I borrowed money from friends and
3 family and also secured loans from friends and family for Mr. Moquin's personal expenses.

4 13. As it turned out, Mr. Moquin was dealing with more than just financial problems.

5 14. I now know that he was struggling with mental health and dealing with other
6 personal crises in his life.

7 15. I have learned that Mr. Moquin and his wife, Natasha, were in a state of nearly
8 constant marital conflict that greatly interfered with his work.

9 16. This culminated in Mr. Moquin suffering what I can only describe as a total
10 mental breakdown in December 2017.

11 17. Around that time, I had learned that there were documents we needed to file with
12 the court.

13 18. As I had done on prior occasions, I sent Mr. Moquin a text message on Saturday,
14 December 2, 2017, to confirm that everything was moving forward okay.

15 19. When Mr. Moquin did not respond, I wrote to him the next day asking if I needed
16 to review anything. Mr. Moquin did not respond again.

17 20. In fact, during the first week in December, I texted and/or called Mr. Moquin
18 daily, often without receiving any response. I grew increasingly alarmed, but when I did speak
19 with Mr. Moquin, he would always assure me that everything was fine and he would offer some
20 plausible explanation for why things were not due yet or could be filed at a later date.

21 21. True and correct copies of text messages I exchanged with Brian Moquin between
22 December 2, and December 6, 2017, are attached as Exhibit 2.

23 22. Based on Mr. Moquin's assurances, I expected that he would come through.

24 23. The following week, I was copied on an email exchange between Mr. Moquin and
25 the local attorney we were using, David O'Mara. In that exchange, Mr. O'Mara had expressed
26 concerns about whether we would be able to file three oppositions and some other briefs that
27 were apparently due. Yet, on Monday, December 11, 2017, Mr. Moquin assured us that "all
28 three oppositions will be filed today."

1 24. Later, when Mr. O'Mara sought confirmation that Mr. Moquin had filed the
2 oppositions, Mr. Moquin did not provide a clear answer, but did not seem concerned.

3 25. A true and correct copy of that email exchange is attached as Exhibit 3.

4 26. I later learned that Mr. Moquin had not filed the required oppositions, but that he
5 apparently received more time to do so.

6 27. The next week I followed up with Mr. Moquin to ensure that he had filed the
7 required documents, but Mr. Moquin explained that he was not yet finished.

8 28. I sent Mr. Moquin a text message on Tuesday, December 19, 2017, asking if the
9 documents were almost finished. Mr. Moquin said that they were almost finished and that he
10 should be able to finalize them that night.

11 29. The next day, however, Mr. Moquin failed to respond. I kept texting the next day
12 and he still failed to respond. Finally, on Thursday, December 21, Mr. Moquin assured me that
13 he was "still on it."

14 30. After that, however, Mr. Moquin stopped responding again. I kept texting him
15 until December 25 asking for an update and pleading with him to get the documents filed, but did
16 not receive a response.

17 31. True and correct copies of text messages I exchanged with Brian Moquin between
18 December 19, and December 25, 2017, are attached as Exhibit 4.

19 32. I could not understand why Brian kept claiming that he was almost finished, but
20 kept failing to file the required documents.

21 33. Mr. Moquin apparently suffered a total mental breakdown and also had some
22 terrible conflicts with his wife, Natasha.

23 34. After having worked with him for years, and having met his wife and his family, I
24 had terrible sympathy for all of them and wanted to help if I could. At the same time, it was
25 becoming clear to me that Mr. Moquin's personal problems had interfered with his duties to me
26 and the other plaintiffs.

27 35. After Mr. Moquin suffered this mental breakdown, I recommended that he visit
28 Dr. Douglas Mar, who is well-respected psychiatrist in Campbell, California.

1 36. At this time, I also started looking for other attorneys who might be able to help.

2 37. In January 2018, Mr. Moquin was also arrested related to charges of domestic
3 violence.

4 38. Around that same time, Mr. Moquin explained to me that Dr. Mar had diagnosed
5 him with bipolar disorder and that he needed money to pay Dr. Mar for treatment.

6 39. After obtaining a loan from a friend, I arranged to pay Dr. Mar for his services,
7 but I do not know if Mr. Moquin has continued with any course of treatment.

8 40. On March 13, 2018, I paid Dr. Mar's office \$470 to pay for Mr. Moquin's
9 treatment so that Mr. Moquin could get well and help us fix the case.

10 41. A true and correct copy of my receipt for that payment is attached as Exhibit 5.

11 42. Mr. Moquin was also supposed to obtain a letter from Dr. Mar evidencing his
12 diagnosis and treatment.

13 43. Despite paying for Mr. Moquin's treatment, and despite numerous requests from
14 me and my new attorneys, Mr. Moquin still failed to provide us with that letter from Dr. Mar.

15 44. In fact, my current attorneys repeatedly requested Mr. Moquin to provide his files
16 and other important information.

17 45. A true and correct copy of a series of emails from attorney Richard Williamson to
18 Mr. Moquin, between February 5 and March 21, 2018, is attached as Exhibit 6.

19 46. Mr. Williamson and I both repeatedly asked Mr. Moquin to provide a summary of
20 the case, documents regarding his mental illness, and his case files.

21 47. From January through March, 2018, Mr. Moquin repeatedly assured me that he
22 would provide me with all of the information that my new attorneys needed to reinstate the case.

23 48. On March 30, Mr. Moquin assured me that he will "get everything out the door
24 before I leave today." In response, I asked if he had obtained the requested documentation from
25 Dr. Mar, and Mr. Moquin told me that he was playing phone tag with a person in Dr. Mar's
26 office. I then followed up to ask if he had advised Mr. Williamson of the status, and he assured
27 me that he would.

28

1 49. I then sent text messages on March 31, April 1, and April 2 urging Mr. Moquin to
2 provide Mr. Williamson with everything he needed to try and reinstate this case.

3 50. Mr. Moquin then responded with an alarming rant, which included the following:
4 “I’m not sure what part of ‘[expletive] off’ you don’t understand, but it is in your best interest to
5 stop communicating with me at this point until I contact you.”

6 51. True and correct copies of text messages I exchanged with Brian Moquin between
7 March 30, and April 2, 2018, are attached as Exhibit 7.

8 52. Mr. Moquin’s abusive and threatening language in his text dated April 2, 2018, is
9 just one example of the abusive treatment I received from Mr. Moquin.

10 53. In early April, Mr. Williamson and another attorney in his office, Jonathan Tew,
11 both repeatedly asked Mr. Moquin for the various documents that he had still not provided.

12 54. A true and correct copy of that series of emails, which occurred between April 2
13 and April 13, 2018, is attached as Exhibit 8.

14 55. Finally, exasperated with Mr. Moquin and his failure to provide the documents
15 that he promised he would provide to fix the problems that he created, we finally felt that we had
16 no choice but to move forward without the documents that Mr. Moquin had promised.

17 56. Mr. Moquin never even gave my new attorneys his complete file.

18 57. In addition to the numerous emails requesting the files, on May 14, 2018,
19 Mr. Williamson sent Mr. Moquin a formal demand for my client files regarding this case.

20 58. A true and correct copy of that letter is attached as Exhibit 9.

21 59. On Wednesday, May 23, 2018, I again wrote to Mr. Moquin begging him to
22 provide a diagnosis letter from Dr. Mar letter, along with evidence that Mr. Moquin claims to
23 possess that he timely disclosed our damage calculations and an affidavit from Mr. Moquin
24 explaining his personal situation and how it impacted his performance in this case.

25 60. Mr. Moquin responded by claiming that he always intended to provide us all of
26 the information we needed, but that he could not get to it until that weekend because he had a
27 hearing in his criminal case on Thursday, May 24. He assured me that he should be able to
28 provide an affidavit and supporting exhibits that weekend.

62. By the afternoon of Monday, May 28, 2018, however, Mr. Moquin still had not provided the documents. Therefore, I wrote to him again asking for the required documents. Mr. Moquin responded by quoting his previous warning not to contact him: “‘Communicate in ANY WAY with me again before I have sent you the declaration and supporting exhibits and you will receive neither.’ So be it.”

63. A true and correct copy of that series of emails, which occurred between May 23 and May 28, 2018, and which have been redacted to protect privileged information, is attached as Exhibit 10.

64. To date, Mr. Moquin has not provided the promised affidavit, letter from Dr. Mar, other supporting exhibits, and damages disclosure information. Despite Mr. Williamson's request, Mr. Moquin has also failed to even provide my client files.

65. Instead, I have had to endure threats and claims from Mr. Moquin based on his view that I am somehow hurting him, his family, and his career.

66. Throughout my experience with him, Mr. Moquin was always so positive about our case and confident that everything would work out. Over the last six months, however, Mr. Moquin's emotional swings have become terrifying and impossible to predict.

67. I am an innocent victim of Mr. Moquin's instability and believe that I deserve an opportunity to prove my case against the defendants.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Dated this 29th day of May, 2018.



Larry J. Willard

EXHIBIT “2”

EXHIBIT “2”

EXHIBIT “2”

< 130



Brian



Sat, Dec 2, 8:40 PM

How is it looking Brian?

Sun, Dec 3, 3:19 PM

Call me when you ready to review anything?

Sun, Dec 3, 8:33 PM

Brian, as long as you are ready for tomorrow I'm ok in not taking the time to review. I kind of think you need to stay focused on getting this done. But God help us if you are not.

Mon, Dec 4, 10:22 AM



Talk later



< 130



Brian



Mon, Dec 4, 10:22 AM

I hope you are up finishing it.

PLEASE RESPOND!!
Aren't you supposed to file answer by noon?

Maybe you are at Law Library? If you are I apologize for my reactions —

Tue, Dec 5, 2:11 AM

How does look now?

Hello.

Tue. Dec 5. 11:46 PM



Talk later



< 130



Brian



Tue, Dec 5, 11:46 PM

How is it going?

Wed, Dec 6, 4:49 AM

Still at it Brian?

yes. u up?

Awake—

Wed, Dec 6, 9:36 AM

Brian, I tried reaching you around 7:30am your time. PLEASE TELL ME you are not sleeping or you have already FILED! Call me asap.



Talk later



EXHIBIT “3”

EXHIBIT “3”

EXHIBIT “3”

Rich Williamson

From: Larry Willard <telllarry@gmail.com>
Sent: Tuesday, February 13, 2018 8:01 PM
To: Rich Williamson; Jon Tew
Subject: Fwd: Wooley v BHI

Sent from my iPhone

Begin forwarded message:

From: Brian Moquin <bmoquin@lawprism.com>
Date: December 12, 2017 at 5:41:01 AM CST
To: "David O'Mara, Esq." <david@omaralaw.net>
Cc: Ed Wooley <edwooley@me.com>, Larry Willard <telllarry@gmail.com>
Subject: Re: Wooley v BHI

You mean a clue?

I am departing in 10 minutes, which will give me an hour of slack plus an hour of charging time to work. Should arrive before 9 AM.

Brian
 408.460.7787 cell

On Dec 12, 2017, at 3:18 AM, David O'Mara, Esq. <david@omaralaw.net> wrote:

Brian,

I have not seen any of the three oppositions that we supposed to be file, nor have I seen an affidavit for the motion to extend time to file those oppositions.

I am extremely concerned especially since you said you will be in the road 15 minutes ago (3:00 am) so you can get to the pre-trial conference. Do we have a plan?

David

Sent from my iPhone

On Dec 11, 2017, at 2:16 PM, Brian Moquin <bmoquin@lawprism.com> wrote:

Yes, all three oppositions will be filed today.

I will be driving to Reno starting around 3:00 AM tonight, which my Tesla trip planner says will put me there around 8:00 AM even with stops to recharge.

Brian

On Dec 11, 2017, at 2:07 PM, David O'Mara, Esq. <david@omaralaw.net> wrote:

Brian,

Is anything going to get filed today?

David

Sent from my iPhone

On Dec 11, 2017, at 7:45 AM, David O'Mara, Esq. <david@omaralaw.net> wrote:

Brian,

I hate to tell you this but we probably aren't going to get these oppositions filed because they are so late. If you have any of them done, please file immediately and then work on the next one. Get something, anything on file.

After you file the oppositions, draft an affidavit about why the oppositions were late and why you also missed the two extension dates. You will basically need to beg for mercy and that your client shouldn't suffer for your tardiness.

Third, your appearance tomorrow at the pre trial conference is mandatory. Please make sure you are there.

Fourth, you have to have our reply brief filed by 5:00 pm on Friday.

Finally, you have to then turn your attention to the trial statement and disclosures. I will get you the dates for those filings today.

Please file something now.

Sent from my iPhone

EXHIBIT “4”

EXHIBIT “4”

EXHIBIT “4”

< 130



Brian



Tue, Dec 19, 8:03 PM

Close to finish??

yes. provided i can keep n
out of my hair tonight, i
should be able to pull it all
together.

Wed, Dec 20, 2:55 AM

Really hope this gets filed
soon (today). Just feel we
are really pushing the
envelope.

Wed, Dec 20, 9:13 AM

You available?

Wed, Dec 20, 11:03 AM



iMessage



< 130



Brian



Wed, Dec 20, 11:03 AM

This has to get done!

Wed, Dec 20, 12:50 PM

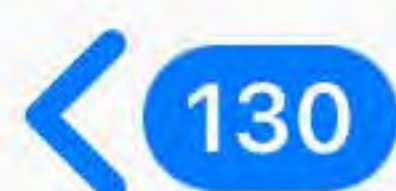
Please call me asap.

no more delays are allowed. slept from 6:30 until now and am back at it. i will call you this afternoon. (((((You sent this text to me Sunday—
NO MORE DELAYS. WHY BRIAN? I (including Karin) has literally put our life's in your hands. I went beyond the terms of our Agreement (contract) in personally borrowing



iMessage





Brian

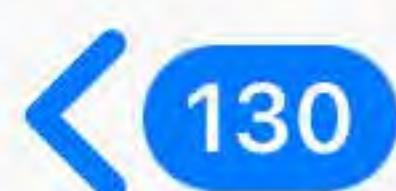


Agreement (contract) in personally borrowing money from family and friends to "loan" (with personal liability) to you in order to help you be in a better position to not only "protect" our interests but to obtain successful Settlements which should have been obtainable. Now I find myself in a terrible situation with both cases because of your inability to meet deadlines with required responses. Brian, the pressure and anxiety is overwhelming. I am so tired of being in this



iMessage





BM

Brian



situation. I just don't know what to do. Am I being unrealistic in believing "it's all going to turn out ok"? I kept that attitude for a long time but now find the DOUBT creeping in and really messing with my mind. You need to wrap this up and get it FILED and request through an appeal for this several day extension BASED on dealing with responses that took more time based on the deceit and perpetration brought in opposing Counsel's motions. PLEASE!!!



iMessage



< 130



Brian



Thu, Dec 21, 1:06 AM

How is it going—

Thu, Dec 21, 8:30 AM

Did not get back to me!
Guess did not finish?
When Brian?

Thu, Dec 21, 3:07 PM

Brian, we don't need to
talk—

i am still on it.


Fri, Dec 22, 3:25 AM

How does it look now? I
presume the target is to



iMessage



 130

BM

Brian



Fri, Dec 22, 3:25 AM

How does it look now? I presume the target is to file by 10am?

Hello? Are you working on it. I sure hope so!


Fri, Dec 22, 11:23 AM

So Brian. I was so hoping I could visit my family without worrying about whether you would finish and file or I would hear more excuses. PLEASE!! Please get this filed today. I've already tried reaching you and presume you are



iMessage



 130

BM

Brian



sleeping. I was hoping to hear you were putting finishing touches to it. The unnecessary stress these delays and lack of timely responses is causing is almost unbearable. I hope you can convince the Judge that they were unavoidable. Please, I'm now begging you to get this FILED TODAY!!!

ARE YOU AVAILABLE??

Fri, Dec 22, 12:46 PM

Give me a call!



iMessage



< 130



Brian



Fri, Dec 22, 1:53 PM

Are you up?

Brian, we both agreed how important and in fact you assured me of filing this TODAY!

Are you up?

Please call me!

Fri, Dec 22, 11:31 PM

Are you going to file tonight? Hope so.

Are you available?



iMessage



< 130



Brian



Sat, Dec 23, 6:49 PM

Brian, are you available to talk. Just talked to Ed and think we better talk about that conversation.

Sun, Dec 24, 10:19 AM

Are of you up?

Mon, Dec 25, 2:51 PM

Merry Christmas Brian!
My best to family! I remain hopeful. I'm anticipating getting the best gift ever:
CONFIRMATION OF FILINGS ON HERBST.



iMessage



EXHIBIT “5”

EXHIBIT “5”

EXHIBIT “5”

M DOUGLAS MAR MD
3425 S BASCOM AVE
CAMPBELL, CA 95008

03/13/2018

11:27:17

CREDIT CARD

VISA SALE

Card # XXXXXXXXXXXXX3340

SEQ #: 3

Batch #: 313

INVOICE 3

Approval Code: 072714

Entry Method: Manual

Mode: Online

Avs Code: YYY

SALE AMOUNT

\$470.00

CUSTOMER COPY

EXHIBIT “6”

EXHIBIT “6”

EXHIBIT “6”

Rich Williamson

From: Rich Williamson
Sent: Wednesday, March 21, 2018 2:12 PM
To: 'bmoquin@lawprism.com'; 'brianmoquin@yahoo.com'
Cc: Jon Tew; 'Larry Willard'
Subject: RE: Status of Case Summary for Willard & Wooley

Brian,

I hope that you are doing well. Thank you again for forwarding the court papers, legal research, and other documents you provided two weeks ago. Have you been able to compile the other documents we need yet? We are still waiting on the following:

1. A detailed case summary of the current procedural posture, the parties' respective claims, the damages each party is claiming, the key documents supporting and hurting each side, and the witnesses who have discoverable information.
2. Letters, diagnoses, medical records, and other documents explaining your mental, emotional, and psychological health at this time and for the past two years, including any explanation of how any mental, emotional, or psychological conditions affected your ability to work, respond to deadlines, and manage the case.
3. Letters, arrest records, orders, and other documents regarding the domestic disputes with your wife, including anything that might explain how those disputes affected your ability to work, respond to deadlines, and manage this case now and at any time in the past two years.
4. The remaining portions of your file, including all discovery responses, evidence, disclosures, notes, spreadsheets, draft documents, agreements, transcripts, recordings, expert witness reports, and other items that could in any way pertain to this case.

Please let us know when we can expect these items. To be honest, items #s 2 & 3 are the most critical for the motion to set aside, so please prioritize those as much as possible.

Thanks,

Rich

Richard D. Williamson, Esq.
Robertson, Johnson, Miller & Williamson
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From: Rich Williamson

Sent: Tuesday, February 20, 2018 12:04 PM

To: 'bmoquin@lawprism.com'; 'brianmoquin@yahoo.com'

Cc: Jon Tew; David Robertson (gdavid@nvlawyers.com); 'Ed Wooley'; 'Larry Willard'

Subject: RE: Status of Case Summary for Willard & Wooley

Importance: High

Brian,

We just tried calling you, but the message for your phone number says that the subscriber "is out of service." We have not yet received a response to the below email, and we really need the following items ASAP:

1. A detailed case summary of the current procedural posture, the parties' respective claims, the damages each party is claiming, the key documents supporting and hurting each side, and the witnesses who have discoverable information.
2. Letters, diagnoses, medical records, and other documents explaining your mental, emotional, and psychological health at this time and for the past two years, including any explanation of how any mental, emotional, or psychological conditions affected your ability to work, respond to deadlines, and manage the case.
3. Letters, arrest records, orders, and other documents regarding the domestic disputes with your wife, including anything that might explain how those disputes affected your ability to work, respond to deadlines, and manage this case now and at any time in the past two years.
4. Your entire file, including all pleadings, briefs, discovery responses, evidence, disclosures, notes, spreadsheets, draft documents, agreements, transcripts, recordings, legal research, expert witness reports, and other items that could in any way pertain to this case.

In addition, to allow us to obtain all of the necessary documents for item number 2, we would prefer to get a signed HIPAA release from you. Please let us know if you have any questions. Otherwise, please provide all of the above information as soon as it is available as time is quickly evaporating.

Thanks,

Rich

Richard D. Williamson, Esq.

Robertson, Johnson, Miller & Williamson

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Reno, Nevada 89501

Telephone: (775) 329-5600

Facsimile: (775) 348-8300

Email: Rich@NVLawyers.com

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From: Rich Williamson
Sent: Monday, February 05, 2018 3:11 PM
To: 'bmoquin@lawprism.com'; 'brianmoquin@yahoo.com'
Cc: Jon Tew; David Robertson (gdavid@nvlawyers.com)
Subject: Status of Case Summary for Willard & Wooley
Importance: High

Brian,

I hope that you are doing well and have been able to get your files organized. When we last spoke on Friday, January 26, you had planned to get us a case summary by Monday, January 29. Unfortunately, we have not yet received anything. Moreover, the one DropBox file that we did receive from you contained mostly empty file folders. Have you been able to organize all of your files and prepare a detailed case summary?

If we are going to have any chance of getting the case reinstated, we will need the following materials from you as soon as possible:

1. A detailed case summary of the current procedural posture, the parties' respective claims, the damages each party is claiming, the key documents supporting and hurting each side, and the witnesses who have discoverable information.
2. Letters, diagnoses, medical records, and other documents explaining your mental, emotional, and psychological health at this time and for the past two years, including any explanation of how any mental, emotional, or psychological conditions affected your ability to work, respond to deadlines, and manage the case.
3. Letters, arrest records, orders, and other documents regarding the domestic disputes with your wife, including anything that might explain how those disputes affected your ability to work, respond to deadlines, and manage this case now and at any time in the past two years.
4. Your entire file, including all pleadings, briefs, discovery responses, evidence, disclosures, notes, spreadsheets, draft documents, agreements, transcripts, recordings, legal research, expert witness reports, and other items that could in any way pertain to this case.

Please send us everything that you can as soon as you can. If some of the above material is ready right now, please send it. We are happy to receive things in several batches. But, time is of the essence and we really need to start collecting and reviewing these materials.

Please do not hesitate to contact us if you have any questions or if there is anything we can do to help. Otherwise, please do everything you can to help get us up to speed and give us as much substantive information as possible.

Thanks,

Rich

Richard D. Williamson, Esq.
Robertson, Johnson, Miller & Williamson
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Reno, Nevada 89501
Telephone: (775) 329-5600
Facsimile: (775) 348-8300
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Please visit our Website at: www.nvlawyers.com

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EXHIBIT “7”

EXHIBIT “7”

EXHIBIT “7”

< 110

BM

Brian



Just got back from paying the minimum on the car, then stopped by a tire shop but they're closed until 3 for Good Friday.

I'll get everything out the door before I leave today

Any word on Dr. Mar?

Playing phone tag with Kathryn

You said you would discuss where we are with Rich? Please do that.

I will

Tks. No word from opposing counsel.



iMessage



< 110



Brian



Tks. No word from opposing counsel.

Sat, Mar 31, 11:39 AM

Brian, are you available?

Please call me when you are up.

Sun, Apr 1, 6:39 PM

We good now??

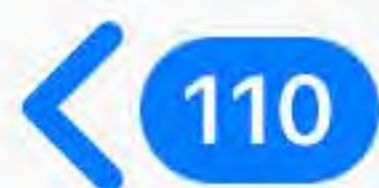
Sun, Apr 1, 7:50 PM

Brian, please call me and get me up to speed with everything. I suppose you by now have everything but the affidavit re: Dr. Mar and hopefully will have that out of the way this



iMessage





Brian



that out of the way this week.

Mon, Apr 2, 4:57 PM

Did you call Williamson yet?

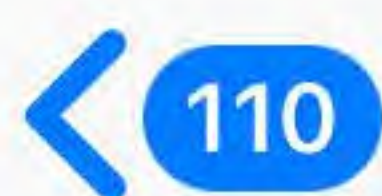
Mon, Apr 2, 6:45 PM

Please send off what you have to Williamson. I guess I can only hope this gets turned around. Getting the affidavit re: Dr. Mar is very important to me Brian. I guess I just have to trust the process. For the life of me I do not understand why you react to my concerns after being put in this terrible



iMessage





Brian



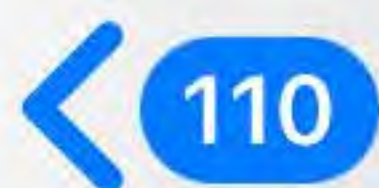
position.

Let's recount: conniving bitch conspires to destroy my entire life, sabotages numerous cases, places me in imminent threat of incarceration and effectively quashes my ability to survive, fraudulently bars me from seeing my own children, sells off my possessions, and leaves me homeless. Meanwhile, I forego seeking a stable existence for your benefit, and in the midst of utterly crushing emotional and situational turmoil you have the gall to call me up and berate me despite my



iMessage





Brian




numerous warnings not to do so. I'm not sure what part of "fuck off" you don't understand, but it is in your best interest to stop communicating with me at this point until I contact you. I will get everything finalized to my satisfaction shortly, and I will weather the overt defamation in the public record for your benefit. But push me any further and I swear you will never hear from me again. Think what you will, I will not take any shit from anyone ever again.

Still no notice of entry of judgment in the other



iMessage



 110

BM



Brian

case.

Do not respond. I will contact you soon and things will turn around.

Wed, Apr 4, 3:49 PM

Brian, we are trying to make a decision on whether we need to sell our place and downsize. I'm not sure what to do. Xiu is carrying the total burden with my inability to contribute. If I felt good about everything working out I would try to hang in. I realize much has been depending on your ability to complete everything but really struggling now



iMessage



EXHIBIT “8”

EXHIBIT “8”

EXHIBIT “8”

Rich Williamson

From: Rich Williamson
Sent: Friday, April 13, 2018 12:09 PM
To: 'Brian Moquin'
Cc: Jon Tew; 'Larry Willard'
Subject: RE: Follow-Up re: Rule 60(b) Supporting Documents

Importance: High

Brian,

I just left you a voicemail, but wanted to follow-up with an email. As you probably saw, Judge Simons entered two orders today: an order granting the defendants/counterclaimants' motion to dismiss their counterclaims, and an order dismissing Ed Wooley's claims with prejudice. She has not yet entered a final judgment against Larry, but I fear that could come any day. Therefore, we must get the set aside motion finalized and filed today or early next week. We have not received the documents that you were supposed to send earlier this week. Please send all of that material immediately. We need everything you have ASAP.

Thanks,

Rich

Richard D. Williamson, Esq.
 Robertson, Johnson, Miller & Williamson
 50 West Liberty Street, Suite 600
 Reno, Nevada 89501
 Telephone: (775) 329-5600
 Facsimile: (775) 348-8300
 Email: Rich@NVLawyers.com
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From: Rich Williamson
Sent: Tuesday, April 10, 2018 6:16 PM

To: 'Brian Moquin'
Cc: Jon Tew; Larry Willard
Subject: RE: Follow-Up re: Rule 60(b) Supporting Documents

Brian,

That sounds great. Thank you.

Best regards,

Rich

Richard D. Williamson, Esq.
Robertson, Johnson, Miller & Williamson
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Telephone: (775) 329-5600
Facsimile: (775) 348-8300
Email: Rich@NVLawyers.com
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From: Brian Moquin [<mailto:bmoquin@lawprism.com>]
Sent: Tuesday, April 10, 2018 5:02 PM
To: Rich Williamson
Cc: Jon Tew; Larry Willard
Subject: Re: Follow-Up re: Rule 60(b) Supporting Documents

Will do. I need to go out for a while but will either send the scans tonight or tomorrow morning. I emphasized the urgency to Dr. Mar; he is leaving for vacation next Monday, so I anticipate him turning it around before then.

I will send you an update along with the draft objections, etc., tomorrow at the latest.

Brian

On Apr 10, 2018, at 4:56 PM, Rich Williamson <rich@nvlawyers.com> wrote:

Brian,

Thank you for your call. I am sorry for all of the troubles that you are going through, but hope that they are almost resolved. As I mentioned, we really need to get the set aside motion on file this week or next. If you can send me the Santa Clara County scans regarding the issues with your wife, that would be great. Tonight would be ideal, but tomorrow is fine too. As for the Dr. Mar letter, a current analysis should be fine. Can you please have him provide that this week?

I will look forward to hearing from you tomorrow on the status of these items.

Thanks again,

Rich

Richard D. Williamson, Esq.
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 50 West Liberty Street, Suite 600
 Reno, Nevada 89501
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From: Jon Tew
Sent: Monday, April 02, 2018 5:17 PM
To: bmoquin@lawprism.com
Cc: Rich Williamson
Subject: Follow-Up re: Rule 60(b) Supporting Documents
Importance: High

Hi Brian,

I just wanted to follow up quickly. As you know, the Defendants have submitted their Request for Judgment for decision. While we opposed that request, there is no guarantee that the Court will wait to enter judgment.

So, with respect to getting our Rule 60(b) motion on file, time is of the essence. I know you are working on putting together a lot of information and documents. Rich has consistently distilled that information and documents into the below four

categories. I think the most pressing items we need ASAP are numbers 2 & 3. In particular, we really need a report or letter from the psychiatrist so that we have independent, third-party support for our Rule 60(b) motion. Your declaration, outlining #'s 2 & 3, is probably the second highest priority. Do you have any idea when you can get us those documents?

While the Rule 60(b) deadline might not be immediate, our need to file the Rule 60(b) motion is immediate because of the Defendants' request for judgment and other procedural maneuvers.

Thanks!!

Jon

1. Brian's detailed case summary of the current procedural posture, the parties' respective claims, the damages each party is claiming, the key documents supporting and hurting each side, and the witnesses who have discoverable information.
2. Letters, diagnoses, medical records, and other documents explaining Brian's mental, emotional, and psychological health, including anything that might explain how Brian's problems affected his ability to manage this case for the past two years.
3. Letters, arrest records, orders, and other documents regarding the domestic disputes that Brian has had with his wife, including anything that might explain how those disputes affected his ability to manage this case now and for the last two years.
4. Brian's entire file, including all case-related papers, briefs, discovery responses, evidence, disclosures, notes, spreadsheets, draft documents, agreements, transcripts, recordings, legal research, expert witness reports, and other items that could in any way pertain to this case.

Jonathan Joel Tew, Esq.
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 Email: jon@nvlawyers.com
 Please visit our Website at: www.nvlawyers.com

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EXHIBIT “9”

EXHIBIT “9”

EXHIBIT “9”

Robertson, Johnson, Miller & Williamson

ATTORNEYS AND COUNSELORS AT LAW

G. DAVID ROBERTSON (NV & CA)
KIRK C. JOHNSON (NV, AZ & CO)
JARRAD C. MILLER (NV & CA)
RICHARD D. WILLIAMSON (NV & CA)

JONATHAN J. TEW (NV & IL)
ANTHONY G. ARGER (NV & CA)
ALISON GANSERT KERTIS (NV, CA & WI)

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REPLY TO: RENO OFFICE

May 14, 2018

VIA EMAIL & U.S. MAIL

Brian P. Moquin, Esq.
Law Offices of Brian P. Moquin
1250 Oakmead Pkwy, Ste. 210
Sunnyvale, CA 94085-4035
bmoquin@lawprism.com

Re: *Willard, et al. v Berry-Hinckley Industries, et al. (Case No. CV14-01712)*

Dear Mr. Moquin:

As you know, our office represents Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund, and Overland Development Corporation (collectively, the "Willard Plaintiffs") in case number CV14-01712, which is currently pending in the Second Judicial District Court of the State of Nevada in and for the County of Washoe. As you know, we have been requesting information from you for several months. We have repeatedly asked you for correspondence, discovery disclosures, affidavits, summaries, records releases, your entire client file, and other documents that would help show the trial court why it should set aside the dismissal that it entered when you failed to respond to the Defendants' various motions.

It now seems clear that you have no intention of taking any action to mitigate the damage you have caused in this case. Nonetheless, you still have legal and ethical duties to provide the client-related materials that are in your possession, custody, or control.

Pursuant to Rule 3-700(D)(1) of the California Rules of Professional Conduct, you are required to "promptly release to the client, at the request of the client, all the client papers and property." As the rule goes on to explain, this includes all "correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not"

Brian P. Moquin, Esq.
May 14, 2018
Page 2

Rule 1.16(d) of the Nevada Rules of Professional Conduct likewise requires a lawyer to surrender all papers and other property to which the client is entitled. This obligation is reinforced by NRS NRS 7.055(1), which further emphasizes a lawyer's duty to "immediately deliver to the client all papers, documents, pleadings and items of tangible personal property which belong to or were prepared for that client."

In light of the above authorities, you have no right to continue to withhold the Willard Plaintiffs' files regarding case number CV14-01712 and their disputes with Berry-Hinckley Industries and Jerry Herbst. As you well know, there are events and deadlines occurring in the case. It is critical that we obtain the Willard Plaintiffs' complete case file immediately.

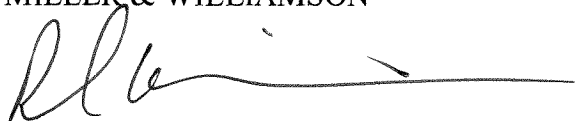
We demand that you immediately produce all of your files regarding the issues and disputes involved in case number CV14-01712 (which files must include, without limitation, all print and electronic correspondence, all draft and filed pleadings, all deposition transcripts, all exhibits, any physical evidence, all expert reports, all other papers and documents, and all other items reasonably necessary to represent the Willard Plaintiffs in case number CV14-01712).

Finally, we want to confirm that we have only been retained to represent the Willard Plaintiffs in case number CV14-01712. We do not represent any of the Willard Plaintiffs in any other cases, disputes, or legal matters. Therefore, if you have performed any other work for any of the Willard Plaintiffs, we expect that you will complete any such work and/or transition the work to competent counsel.

Please do not hesitate to contact us if you have any questions or concerns. Otherwise, we look forward to receiving the file for case number CV14-01712 by no later than May 24, 2018.

Best regards,

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

A handwritten signature in black ink, appearing to read 'R. Williamson', followed by a long horizontal line.

Richard D. Williamson, Esq.

cc: Mr. Larry Willard (via email only)

EXHIBIT “10”

EXHIBIT “10”

EXHIBIT “10”

Rich Williamson

From: Larry Willard <telllarry@gmail.com>
Sent: Monday, May 28, 2018 3:42 PM
To: Rich Williamson
Subject: Fwd: Due date TUESDAY

[REDACTED]

Sent from my iPhone

Begin forwarded message:

From: Brian Moquin <bmoquin@lawprism.com>
Date: May 28, 2018 at 4:49:14 PM CDT
To: Larry Willard <telllarry@gmail.com>
Subject: Re: Due date TUESDAY

"Communicate in ANY WAY with me again before I have sent you the declaration and supporting exhibits and you will receive neither." So be it.

On May 28, 2018, at 2:19 PM, Larry Willard <telllarry@gmail.com> wrote:

I'm still looking or the affidavit and supporting documents you said I would have this weekend even though you were given the date of May 24 to comply. You realize that our filing has to be tomorrow and you were formally asked by Williamson for the documents backed up with legal requirements. Your actions have and are greatly prejudicing my Case. Please immediately EMAIL them to me so I can forward to Williamson since you will not respond to Williamson.

On May 23, 2018, at 5:11 PM, Brian Moquin
<bmoquin@lawprism.com> wrote:

So I am no longer a malicious, unconscionable prick?

What you're asking me to do is what the plan was all along, until your asshole attorneys jumped the gun for lack of knowledge of the law and out of some enormous misconstrual of who I am and my tolerance level for abuse. I will deal with them later. I need to move what little is left out of the house today and tomorrow, and have a hearing in the criminal case in the morning. I should be able to get you an affidavit and supporting exhibits this weekend, but I will not deal with your motherfucker attorneys again, so it's up to you to pass the pleadings along to them.

Brian

Sent from my iPhone

On May 23, 2018, at 11:11 AM, Larry Willard
<telllarry@gmail.com> wrote:

Brian, of course you are aware that this coming Tuesday is when my Response to opposing Counsel is due. That's it. Judge Simon is waiting for that to make a Final Judgment.

[REDACTED]

I would obviously be eternally grateful if that possibility (getting Dr. Mar letter) was still possible. I discussed the CD you said you were sending and mentioned it would verify that Opposing Counsel was aware of the damages. They are hopeful they get that this week so they can include in Tuesday response.

[REDACTED]

But in any event would be so grateful if you could respond to them. They said that an Affidavit from you explaining your situation and how it affected your ability to respond could be very helpful in persuading Judge Simon to Set Motion Aside. I realize there has been some antagonism between us and I do realize the incredible burden and stress you have been experiencing brought upon by Natasha. I never meant to contribute to that and if I did I'm sorry. I really had hoped to come out of this with a descent Settlement and had every attention of making you a benefactor of that in spite of how it shook out to get there. I had hoped you knew me well enough to accept that as my true intention. But here we are and quite frankly I'm pretty scared. I sincerely ask you to do all you can to respond in this very narrow window of time.

Sent from my iPhone

FILED
Electronically
CV14-01712
2018-05-29 04:56:00 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6702327 : overa

EXHIBIT “11”

EXHIBIT “11”

EXHIBIT “11”

1 THE O'MARA LAW FIRM, P.C.
2 DAVID C. O'MARA, ESQ.
3 NEVADA BAR NO. 8599
4 311 East Liberty Street
Reno, Nevada 89501
Telephone: 775/323-1321
Fax: 775/323-4082

5 *Local Counsel for Plaintiffs*
6 LARRY J. WILLARD,
OVERLAND DEVELOPMENT CORPORATION,
EDWARD C. WOOLEY, and JUDITH A. WOOLEY

7 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR THE COUNTY OF WASHOE**

9 LARRY J. WILLARD, individually and as
10 trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
11 CORPORATION, a California corporation;
EDWARD C. WOOLEY AND JUDITH A.
12 WOOLEY, individually and as trustees of the
Edward C. Wooley and Judith A. Wooley
13 Intervivos Revocable Trust 2000,

14 Plaintiffs,

v.

15 BERRY-HINCKLEY INDUSTRIES, a
Nevada corporation; JERRY HERBST, an
16 individual; and JH, INC., a Nevada
corporation,

17 Defendants.

18
19 **AND RELATED COUNTERCLAIM**

Case No. CV14-01712

Dept. 6

20 **NOTICE OF WITHDRAWAL OF LOCAL COUNSEL**

21 David C. O'Mara, Esq., of The O'Mara Law Firm, P.C. hereby withdraws as local
22 counsel for all Plaintiffs. Counsel has had no contact with lead counsel Mr. Moquin for many
23 months with a total failure just prior to the Court's first decisions being filed in this case. Mr.
24 Moquin was unresponsive during the time in which this Court was deciding the pending motions,
25 even after counsel begged him for a response to be filed with the Court and was told he would
26 provide such response.

27 Undersigned Counsel was retained solely as local counsel, and provided Mr. Moquin
28 with the necessary information related to the Court's filing requirement and timelines.

1 Undersigned Counsel was retained only to provide services as directed by Mr. Moquin, and
2 would be relieved of services if Mr. Moquin was removed. Clients have relieved Mr. Moquin as
3 counsel, and thus, this Court should revoke his pro hac admissions.

4 All future correspondence and pleadings should be sent to Mr. Ed Wooley at his last
5 known address of 1172 Via Casa Palermo, Henderson, Nevada 89011, and Larry Willard at his
6 last known address 826 Vanderbilt Place, San Diego California 92103.

7
8 **AFFIRMATION**
(Pursuant to NRS 239B.030)

9 The undersigned does hereby affirm that the preceding document filed in the above
10 referenced matter does not contain the social security number of any person.

11 DATED: March 15, 2018

THE O'MARA LAW FIRM, P.C.

12
13
14 /s/ David C. O'Mara
DAVID C. O'MARA, ESQ

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The O'Mara Law Firm, P.C., 311 E. Liberty Street, Reno, Nevada 89501, and on this date I served a true and correct copy of the foregoing document on all parties to this action by:

_____ Depositing in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, following ordinary business practices

_____ Personal Delivery

_____ Facsimile

_____ Federal Express or other overnight delivery

_____ Messenger Service

_____ Certified Mail with Return Receipt Requested

 X Electronically through the Court's ECF system

addressed as follows:

DICKSON WRIGHT
John P. Desmond
Brian R. Irvine
Anjali D. Webstaer
100 West Liberty Street, Ste 940
Reno, NV 89501
jdesmond@dickinsonwright.com
birvine@dickinsonwright.com
awebster@dickinsonwright.com

Ed Wooley
1173 Via Casa Palermo
Henderson, Nevada 89011

LAW OFFICES OF BRIAN P. MOQUIN
Brian P. Moquin, Esq.
3278 Ruffino Lane
San Jose, CA 95148

Larry Willard
826 Vanderbilt Place
San Diego California 92103

DATED: March 15, 2018

/s/ Valerie Weis
VALERIE WEIS

1 CODE NO. 3370
2
3
4

5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE
7

8 LARRY J. WILLARD, individually and as
9 trustee of the Larry James Willard Trust Fund;
10 OVERLAND DEVELOPMENT
11 CORPORATION, a California corporation;
12 EDWARD C. WOOLEY AND JUDITH A
13 WOOLEY, individually and as trustees of the
14 Edward C. Wooley and Judith A. Wooley
15 Intervivos Revocable Trust 2000,

16 Plaintiffs,

17 vs.

18 BERRY-HINCKLEY INDUSTRIES, a Nevada
19 Corporation; and JERRY HERBST, an
20 individual,

21 Defendants.
22 _____/

23 BERRY-HINCKLEY INDUSTRIES, a
24 Nevada corporation; and JERRY HERBST,
25 an individual;

26 Counterclaimants,

27 vs

28 LARRY J. WILLARD, individually and as
trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
CORPORATION, a California corporation;

Counter-defendants.
_____/

Case No. CV14-01712

Dept. No. 6

**ORDER RE REQUEST FOR ENTRY
OF JUDGMENT**

1 to file a motion pursuant to NRCP 60(b),² which would relieve the Willard Plaintiffs from the
2 following orders: (1) *Order Granting Defendants'/Counterclaimants' Motion for Sanctions*, (2)
3 *Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to*
4 *Exclude the Expert Testimony of Daniel Gluhaich*, and (3) *Findings of Fact, Conclusions of*
5 *Law, and Order on Defendants' Motion for Sanctions*. *Id.* As such, the Willard Plaintiffs
6 maintain the Court should not enter final judgment until it has had an opportunity to review
7 their *Rule 60(b) Motion*.
8

9 In their *Reply*, Defendants reiterate this Court should enter judgment pursuant to
10 NRCP 58(a)(2) and highlight the Willard Plaintiffs' continuous refusal to comply with basic
11 discovery obligations and this Court's orders for several years. *Reply*, p. 3. In addition,
12 Defendants maintain the Willard Plaintiffs also had the benefit of local counsel, and thus,
13 Mr. Moquin's failures do not provide a remedy under NRCP 60(b).
14

15 Pursuant to Rule 58(a)(2) of the Nevada Rules of Civil Procedure, "upon a decision
16 by the court granting other relief, or upon a special verdict or a general verdict accompanied
17 by answers to interrogatories, the court shall promptly approve the form and sign the
18 judgment, and the judgment shall be filed by the clerk." NRCP 58(a)(2).
19

20 The Court recognizes entry of judgment may be appropriate in this case, as the
21 Court's *Order Granting Defendants'/Counterclaimants' Motion for Sanctions* constitutes
22 "other relief" which dismissed all of the Willard Plaintiffs' claims. However, the Court finds
23 the ruling on the *Request* should be held in abeyance, at this juncture, as the Court will
24 consider the Willard Plaintiff's *Rule 60(b) Motion*. Defendants may resubmit the instant
25 *Request* once the Court rules on the NRCP 60(b) motion, if denied.
26
27

28

² On April 18, 2018, and subsequent to the filing of the instant *Request*, the Willard Plaintiffs filed *Willard Plaintiffs' Rule 60(b) Motion* ("Rule 60(b) Motion").

ORDER RE REQUEST FOR ENTRY OF JUDGMENT

Before this Court is a *Request for Entry of Judgment* (“*Request*”) filed by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES (“Berry-Hinckley”) and JERRY HERBST (“Mr. Herbst”) (collectively, “Defendants”), by and through their counsel Brian Irvine, Esq. of Dickinson Wright, PLLC. In response, Plaintiffs/Counter-Defendants LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund, and OVERLAND DEVELOPMENT CORPORATION (collectively, “Willard Plaintiffs”) filed their *Opposition to Request for Entry of Judgment* (“*Opposition*”), by and through their counsel, Richard D. Williamson, Esq. and Jonathan Joel Tew, Esq. of Robertson, Johnson, Miller & Williamson.¹ Defendants filed their *Reply in Support of Request for Entry of Judgment* (“*Reply*”), and submitted the matter for decision thereafter.

On March 6, 2018, the Court entered its *Findings of Fact, Conclusions of Law, and Order on Defendants’ Motion for Sanctions*, which dismissed all claims asserted by the Willard Plaintiffs. In addition, the Court granted *Defendants/Counterclaimants’ Motion to Dismiss Counterclaims* on April 13, 2018. As a result, all claims of all parties have been dismissed. Accordingly, Defendants request this Court enter final judgment pursuant to NRCP 58(a)(2). *Request*, p. 2.

The Willard Plaintiffs oppose the *Request*, maintaining their former counsel, BRIAN MOQUIN (“Mr. Moquin”), failed to respond to this Court’s orders as a result of Mr. Moquin’s legal and psychological struggles. *Opposition*, p. 2. Now that they are aware of Mr. Moquin’s infirmities and have retained new counsel, the Willard Plaintiffs seek the opportunity to pursue their claims on the merits. *Id.* Accordingly, the Willard Plaintiffs intend

¹ On March 26, 2018, Mr. Williamson and Mr. Tew entered their appearance in this action on behalf of the Willard Plaintiffs. *See Notice of Appearance*, filed March 26, 2018.

1 Accordingly, and good cause appearing therefor,

2 IT IS HEREBY ORDERED Defendants' *Request for Entry of Judgment* is held in
3 abeyance pending the Court's ruling on a related motion.

4 Dated this 4th day of June, 2018.

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6 
7 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
that on the 4th day of June, 2018, I electronically filed the foregoing with the Clerk of
the Court system which will send a notice of electronic filing to the following:

JOHN DESMOND, ESQ.

JONATHAN TEW, ESQ.

ANJALI WEBSTER, ESQ.

RICHARD WILLIAMSON, ESQ.

BRIAN MOQUIN, ESQ.

BRIAN IRVINE, ESQ.

And, I deposited in the County mailing system for postage and mailing with the
United States Postal Service in Reno, Nevada, a true and correct copy of the attached
document addressed as follows:

Handwritten Signature

1 **2475**

2 DICKINSON WRIGHT, PLLC
3 JOHN P. DESMOND
4 Nevada Bar No. 5618
5 BRIAN R. IRVINE
6 Nevada Bar No. 7758
7 ANJALI D. WEBSTER
8 Nevada Bar No. 12515
9 100 West Liberty Street, Suite 940
10 Reno, NV 89501
11 Tel: (775) 343-7500
12 Fax: (775) 786-0131
13 Email: Jdesmond@dickinsonwright.com
14 Email: Birvine@dickinsonwright.com
15 Email: Awebster@dickinsonwright.com

16 *Attorney for Defendants*
17 *Berry Hinckley Industries, and*
18 *Jerry Herbst*

19 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
20 **IN AND FOR THE COUNTY OF WASHOE**

21 LARRY J. WILLARD, individually and as
22 trustee of the Larry James Willard Trust Fund;
23 OVERLAND DEVELOPMENT CASE NO. CV14-01712
24 CORPORATION, a California corporation; DEPT. 6
25 EDWARD E. WOOLEY AND JUDITH A.
26 WOOLEY, individually and as trustees of the
27 Edward C. Wooley and Judith A. Wooley
28 Intervivos Revocable Trust 2000,

Plaintiff,
vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation; and JERRY HERBST, an
Individual;

Defendants.

BERRY-HINCKLEY INDUSTRIES, a
Nevada corporation; and JERRY HERBST,
an individual;

Counterclaimants,
vs

LARRY J. WILLARD, individually and as
trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
CORPORATION, a California corporation;

Counter-defendants.

**MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE
SUR-REPLY**

Defendants/Counterclaimants Berry-Hinckley Industries (“BHI”) and Jerry Herbst (collectively the “Defendants”) by and through their counsel of record, Dickinson Wright, PLLC, hereby respectfully submit this Motion to Strike ten of the eleven new exhibits attached to Plaintiffs Larry J. Willard and Overland Development Corporation’s (collectively “Plaintiffs”) Reply in Support of the Willard Plaintiffs’ Rule 60(b) Motion for Relief (the “Reply”). In the alternative, if this Court is not inclined to grant the Motion to Strike, Defendants respectfully submit their Motion for Leave to File a Sur-Reply allowing Defendants to address the eleven new exhibits attached to the Reply, as they have not yet had opportunity to address those exhibits, which were not attached to Plaintiffs’ Rule 60(b) Motion for Relief.

These Motions are supported by the following Memorandum of Points and Authorities, the pleadings and papers on file herein and any other material this Court may wish to consider.

I. INTRODUCTION AND FACTUAL BACKGROUND

Plaintiffs’ Reply attaches and references eleven (11) new exhibits that were not attached to their original Rule 60(b) Motion for Relief. These exhibits include a new declaration from Plaintiff Larry Willard (Reply at Exhibit 1), copies of text messages between Mr. Willard and his counsel, Brian Moquin (*id.* at Exhibits 2, 4 and 7), copies of emails between Mr. Willard and his counsel (*id.* at Exhibits 3, 6, 8 and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moquin’s doctor on March 13, 2018 (*id.* at Exhibit 5), and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018. (*Id.* at Exhibit 9). As none of these exhibits

were attached to Plaintiffs' Rule 60(b) Motion, Plaintiffs' attempt to use them in support of their Reply is inappropriate, and this Court should strike Exhibits 1-10 to the Reply and refuse to consider them.

In addition, a number of the subject exhibits contain inadmissible hearsay, inadmissible lay opinion testimony, and/or are not relevant to the issues presented in the Rule 60(b) Motion, as they are dated after the entry of this Court's Orders on Defendants' Motion for Sanctions and thus have no probative value as to Plaintiffs' claim of excusable neglect, all of which provide additional grounds to strike Exhibits 1-10 to the Reply.

Finally, if this Court is not inclined to strike Exhibits 1-10 to the Reply, it should grant Defendants leave to file a limited Sur-Reply to address the new exhibits attached to the Reply.

II. LEGAL ARGUMENT

A. *This Court should strike Exhibits 1-10 to the Reply because they were offered for the first time in support of the Reply and were not used to support the Rule 60(b) Motion, which deprived Defendants the opportunity to address the Exhibits*

N.R.C.P. 12(f) states in pertinent part:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules ..., the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

"[C]ourts typically do not consider new evidence first submitted in a reply brief because the opposing party has no opportunity to respond to it." *Crandall v. Starbucks Corp.*, 249 F.Supp.3d 1087, 1104 (N.D.Cal. 2017) (citing *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (citation omitted) ("Where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-movant] an opportunity to respond.")). Here, this Court should strike Exhibits 1-10 to the Reply because they were not offered in support of Plaintiffs' Rule 60(b) Motion, and instead were

1 attached to the Reply, which gave Defendants no opportunity to address them.¹ Accordingly,
2 this Court should enter an Order striking Exhibits 1-10 to the Reply.

3 **B. *Portions of several exhibits to the Reply constitute inadmissible***
4 ***hearsay and speculation and this Court should thus strike those***
5 ***portions***

6 As addressed in Defendants' Opposition to the Rule 60(b) Motion, most of the evidence
7 offered by Plaintiffs in support of the Rule 60(b) Motion about Mr. Moquin's alleged
8 psychological condition constitute nothing more than rank hearsay, speculation and
9 inappropriate and unqualified lay expert opinions. *See* Opposition at pp. 8-11. Much of the new
10 evidence that Plaintiffs attach to their Reply suffers from the same defects.

11 Specifically, Plaintiff Larry Willard submitted another Declaration in support of the
12 Reply, which includes several statements about Mr. Moquin's alleged psychological condition.
13 Mr. Willard states that at some point in 2017, it became apparent to him that Mr. Moquin was
14 having some financial difficulties (*see* Reply at Exhibit 1, ¶11), that he "now know[s]" that Mr.
15 Moquin "was struggling with mental health and dealing with other personal crises" (*id.* at 14),
16 that he has "learned that Mr. Moquin and his wife, Natasha, were in a state of nearly constant
17 marital conflict that greatly interfered with his work" (*id.* at ¶15), that Mr. Moquin's problems
18 "culminated in Mr. Moquin suffering what I can only describe as a total mental breakdown in
19 December 2017" (*id.* at ¶16; *see also* ¶33), and that Mr. Moquin explained to Mr. Willard that
20 he had been diagnosed with bipolar disorder. *Id.* at 38.

21 Clearly, Mr. Willard does not have personal knowledge that would allow him to testify
22 as to any of these alleged facts, and such testimony is thus barred by NRS 50.025. The
23 testimony that Mr. Willard purports to provide addresses Mr. Moquin's personal mental status
24 and the status of his marriage. Mr. Willard could not have obtained this information by
25 observing it, and he does not testify that it is based on his own perceptions. Instead, he could

26 ¹ Exhibits 2-8 to the Reply each predate April 18, 2018, the date on which Plaintiffs filed their
27 Rule 60(b) Motion. As such, Plaintiffs had the opportunity to use those Exhibits in support of
28 the Rule 60(b) Motion, but simply chose not to do so.

only have obtained the information from Mr. Moquin himself (or from Mr. Moquin's wife) and his testimony thus constitutes inadmissible hearsay under NRS 51.035 and 51.065, as there are no exceptions to the hearsay rule that apply.² *See Agnello v. Walker*, 306 S.W.3d 666, 675 (Mo.App. 2010) (hearsay testimony or documentation cannot serve as the evidence necessary to meet movant's burden of persuasion to set aside judgment under Rule 60); *New Image Industries v. Rice*, 603 So.2d 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation). If Mr. Willard did not obtain the information through hearsay, then he is clearly speculating, as he does not testify that he personally observed Mr. Moquin's alleged condition and, even if he had, he is unqualified to speculate as to what that condition meant and what it caused.

Portions of other exhibits also contain inadmissible hearsay. Specifically, all of the texts and emails offered by Plaintiffs that were authored by Mr. Moquin or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and 51.065. Accordingly, this Court should strike the portions of Mr. Willard's Declaration identified above, all of Exhibit 3, the text messages authored by Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in Exhibit 10.

C. *Most of the exhibits attached to the Reply are irrelevant, as they detail events and communications that took place after the events pertinent to the Rule 60(b) Motion*

As this Court is aware, defendants filed their Motion for Sanctions on November 15, 2017. March 6, 2018 Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions ("Sanctions Order") at p. 17, ¶92. Defendants granted Plaintiffs several extensions of time to file an opposition to the Motion for Sanctions, but no opposition was filed. Plaintiffs then filed a December 6, 2017 Request for an extension to oppose the Motion for Sanctions. *Id.* at ¶94. The Court held a status conference on December 12, 2017, which was attended by both

² *See* Opposition at pp. 9-10, n.5.

1 Mr. Moquin and Mr. O'Mara, where the Court granted Plaintiffs' Request for Extension and
2 directed Plaintiffs to respond no later than Monday, December 18, 2017, at 10 AM. *Id.* at ¶95.
3 The Court further directed Defendants to reply no later than January 8, 2018, and set the parties'
4 Motions for oral argument on January 12, 2018. *Id.* at ¶96. Plaintiffs did not file any opposition
5 to Defendants' Motion for Sanctions by December 18 or any time thereafter, nor did Plaintiffs
6 request any further extension. Sanctions Order at ¶98. Accordingly, this Court issued a January
7 4, 2018 Order Granting the Motion for Sanctions.

8 Several of the exhibits Plaintiffs attach to the Reply contain communications that took
9 place after this Court had issued its initial Order granting Defendants' Motion for Sanctions.
10 Specifically, all of Mr. Willard's statements in his Declaration after Paragraph 32 deal with
11 incidents and/or communications that took place after this Court had issued its January 4, 2018
12 Order. *See* Reply at Exhibit 1, ¶¶33-67, all of which detail events and communications from late
13 January 2018 through late May 2018. Similarly, Exhibits 5-10 to the Reply contain only
14 communications and descriptions of events that took place after this Court had already ruled on
15 Defendants' Motion for Sanctions. As such, they are simply not relevant to this Court's
16 determination of whether Plaintiffs have met their burden of proving excusable neglect under
17 NRCP 60(b), and this Court should strike them as irrelevant.

18 **D. *If this Court is not inclined to grant Defendants' Motion to Strike, it***
19 ***should grant Defendants leave to file a Sur-Reply***

20 Finally, if this Court is not inclined to grant Defendants' Motion to Strike, it should
21 grant Defendants leave to file the Sur-Reply attached hereto as **Exhibit 1**. The proposed Sur-
22 Reply attached as Exhibit 1 is limited to addressing the new Exhibits attached to Plaintiffs'
23 Reply. Due process requires that Defendants, at a minimum, have an opportunity to respond to
24 the new Exhibits, as Defendants did not have an opportunity to address those Exhibits as part of
25 their Opposition. *See Provenz*, 102 F.3d at 1483 (citation omitted) ("Where new evidence is
26 presented in a reply to a motion for summary judgment, the district court should not consider
27 the new evidence without giving the [non-]movant an opportunity to respond.").

III. CONCLUSION

For the reasons set forth above, herein, Defendants respectfully request that this Court enter an Order striking Exhibits 1-10 to Plaintiffs' Reply in support of their Rule 60(b) Motion. In the alternative, Defendants request that this Court enter an Order allowing Defendants to file the Sur-Reply attached to this Motion as Exhibit 1.

AFFIRMATION Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 6th day of June, 2018.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
DICKINSON WRIGHT
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
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Email: Awebster@dickinsonwright.com

*Attorney for Defendants Berry Hinckley
Industries, and Jerry Herbst*

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER &
WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Attorneys for Plaintiffs/Counterdefendants

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3287 Ruffino Lane
San Jose, California 95148

DATED this 6th day of June, 2018.

/s/ Mina Reel
An employee of DICKINSON WRIGHT PLLC

EXHIBIT LIST

| Exhibit | Description | Pages³ |
|----------------|--------------------------------------------------------------------------------------------|--------------------------|
| 1 | Sur-Reply In Support Of Opposition To The Willard Plaintiffs' Rule 60(B) Motion For Relief | 17 |

³ Exhibit page count is exclusive of exhibit slip sheet.

EXHIBIT 1

EXHIBIT 1

1 **3795**

2 DICKINSON WRIGHT, PLLC

3 JOHN P. DESMOND

4 Nevada Bar No. 5618

5 BRIAN R. IRVINE

6 Nevada Bar No. 7758

7 ANJALI D. WEBSTER

8 Nevada Bar No. 12515

9 100 West Liberty Street, Suite 940

10 Reno, NV 89501

11 Tel: (775) 343-7500

12 Fax: (775) 786-0131

13 Email: Jdesmond@dickinsonwright.com

14 Email: Brvine@dickinsonwright.com

15 Email: Awebster@dickinsonwright.com

16 *Attorney for Defendants*

17 *Berry Hinckley Industries, and*

18 *Jerry Herbst*

19 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

20 **IN AND FOR THE COUNTY OF WASHOE**

21 LARRY J. WILLARD, individually and as
22 trustee of the Larry James Willard Trust Fund;
23 OVERLAND DEVELOPMENT

CASE NO. CV14-01712

DEPT. 6

24 CORPORATION, a California corporation;
25 EDWARD E. WOOLEY AND JUDITH A.
26 WOOLEY, individually and as trustees of the
27 Edward C. Wooley and Judith A. Wooley
28 Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation; and JERRY HERBST, an
Individual;

Defendants.

BERRY-HINCKLEY INDUSTRIES, a
Nevada corporation; and JERRY HERBST,
an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as
trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
CORPORATION, a California corporation;

Counter-defendants.

**SUR-REPLY IN SUPPORT OF OPPOSITION TO THE WILLARD PLAINTIFFS' RULE
60(b) MOTION FOR RELIEF**

Defendants/Counterclaimants Berry-Hinckley Industries (“BHI”) and Jerry Herbst (collectively the “Defendants”) by and through their counsel of record, Dickinson Wright, PLLC, hereby respectfully submit this Sur-Reply in support of Defendants’ Opposition to Plaintiffs Larry J. Willard and Overland Development Corporation’s (collectively “Plaintiffs”) Rule 60(b) Motion for Relief.

Plaintiffs’ Reply in Support of their Rule 60(b) Motion for Relief (the “Reply”) attaches and references eleven (11) new exhibits that were not attached to their original Rule 60(b) Motion for Relief. These exhibits include a new declaration from Plaintiff Larry Willard (Reply at Exhibit 1), copies of text messages between Mr. Willard and his counsel, Brian Moquin (*id.* at Exhibits 2, 4 and 7), copies of emails between Mr. Willard and his counsel (*id.* at Exhibits 3, 6, 8 and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moquin’s doctor on March 13, 2018 (*id.* at Exhibit 5), and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018. (*Id.* at Exhibit 9). As none of these exhibits were attached to Plaintiffs’ Rule 60(b) Motion, Defendants did not have an opportunity to address such exhibits in their Opposition. This Sur-Reply is intended to address only the eleven (11) new exhibits that Plaintiffs attach to and reference in their Reply.

1. *Portions of several exhibits to the Reply constitute inadmissible hearsay and speculation and should not be considered*

As addressed in Defendants’ Opposition to the Rule 60(b) Motion, most of the evidence offered by Plaintiffs in support of the Rule 60(b) Motion about Mr. Moquin’s alleged

1 psychological condition constitute nothing more than rank hearsay, speculation and
2 inappropriate and unqualified lay expert opinions. *See* Opposition at pp. 8-11. Much of the new
3 evidence that Plaintiffs attach to their Reply suffers from the same defects.

4 Specifically, Plaintiff Larry Willard submitted another Declaration in support of the
5 Reply, which includes several statements about Mr. Moquin’s alleged psychological condition.
6 Mr. Willard states that at some point in 2017, it became apparent to him that Mr. Moquin was
7 having some financial difficulties (*see* Reply at Exhibit 1, ¶11), that he “now know[s]” that Mr.
8 Moquin “was struggling with mental health and dealing with other personal crises” (*id.* at 14),
9 that he has “learned that Mr. Moquin and his wife, Natasha, were in a state of nearly constant
10 marital conflict that greatly interfered with his work” (*id.* at ¶15), that Mr. Moquin’s problems
11 “culminated in Mr. Moquin suffering what I can only describe as a total mental breakdown in
12 December 2017” (*id.* at ¶16; *see also* ¶33), and that Mr. Moquin explained to Mr. Willard that
13 he had been diagnosed with bipolar disorder. *Id.* at 38.

14 Clearly, Mr. Willard does not have personal knowledge that would allow him to testify
15 as to any of these alleged facts, and such testimony is thus barred by NRS 50.025. The
16 testimony that Mr. Willard purports to provide addresses Mr. Moquin’s personal mental status
17 and the status of his marriage. Mr. Willard could not have obtained this information by
18 observing it, and he does not testify that it is based on his own perceptions. Instead, he could
19 only have obtained the information from Mr. Moquin himself (or from Mr. Moquin’s wife) and
20 his testimony thus constitutes inadmissible hearsay under NRS 51.035 and 51.065, as there are
21 no exceptions to the hearsay rule that apply.¹ *See Agnello v. Walker*, 306 S.W.3d 666, 675
22 (Mo.App. 2010) (hearsay testimony or documentation cannot serve as the evidence necessary to
23 meet movant’s burden of persuasion to set aside judgment under Rule 60); *New Image*
24 *Industries v. Rice*, 603 So.2d 895, 897 (Ala. 1992) (affirming trial court’s refusal to grant Rule
25 60 relief where only evidence of excusable neglect was an affidavit containing inadmissible
26 hearsay and speculation). If Mr. Willard did not obtain the information through hearsay, then he

27 ¹ *See* Opposition at pp. 9-10, n.5.
28

1 is clearly speculating, as he does not testify that he personally observed Mr. Moquin's alleged
 2 condition and, even if he had, he is unqualified to speculate as to what that condition meant and
 3 what it caused.

4 Portions of other exhibits also contain inadmissible hearsay. Specifically, all of the texts
 5 and emails offered by Plaintiffs that were authored by Mr. Moquin or Mr. O'Mara constitute
 6 inadmissible hearsay under NRS 51.035 and 51.065. Accordingly, this Court should decline to
 7 consider all of Exhibit 3, the text messages authored by Mr. Moquin in Exhibit 4, the text
 8 messages authored by Mr. Moquin in Exhibit 7, the email authored by Mr. Moquin in Exhibit 8,
 9 and the emails authored by Mr. Moquin in Exhibit 10.

10 **2. *Most of the exhibits attached to the Reply are irrelevant, as they***
 11 ***detail events and communications that took place after the events***
 12 ***pertinent to the Rule 60(b) Motion***

13 As this Court is aware, defendants filed their Motion for Sanctions on November 15,
 14 2017. March 6, 2018 Findings of Fact, Conclusions of Law, and Order on Defendants' Motion
 15 for Sanctions ("Sanctions Order") at p. 17, ¶92. Defendants granted Plaintiffs several extensions
 16 of time to file an opposition to the Motion for Sanctions, but no opposition was filed. Plaintiffs
 17 then filed a December 6, 2017 Request for an extension to oppose the Motion for Sanctions. *Id.*
 18 at ¶94. The Court held a status conference on December 12, 2017, which was attended by both
 19 Mr. Moquin and Mr. O'Mara, where the Court granted Plaintiffs' Request for Extension and
 20 directed Plaintiffs to respond no later than Monday, December 18, 2017, at 10 AM. *Id.* at ¶95.
 21 The Court further directed Defendants to reply no later than January 8, 2018, and set the parties'
 22 Motions for oral argument on January 12, 2018. *Id.* at ¶96. Plaintiffs did not file any opposition
 23 to Defendants' Motion for Sanctions by December 18 or any time thereafter, nor did Plaintiffs
 24 request any further extension. Sanctions Order at ¶98. Accordingly, this Court issued a January
 25 4, 2018 Order Granting the Motion for Sanctions, and then issued the Sanctions Order on March
 26 6, 2018.

27 Several of the exhibits Plaintiffs attach to the Reply contain communications that took
 28 place after this Court had issued its initial Order granting Defendants' Motion for Sanctions.

Specifically, all of Mr. Willard's statements in his Declaration after Paragraph 32 deal with incidents and/or communications that took place after this Court had issued its January 4, 2018 Order. *See* Reply at Exhibit 1, ¶¶33-67, all of which detail events and communications from late January 2018 through late May 2018. Similarly, Exhibits 5-10 to the Reply contain only communications and descriptions of events that took place after this Court had already ruled on Defendants' Motion for Sanctions. As such, they are simply not relevant to this Court's determination of whether Plaintiffs have met their burden of proving excusable neglect under NRCP 60(b).

3. *The limited admissible evidence does not show excusable neglect on the part of Plaintiffs*

This Court dismissed Plaintiffs' claims, not only because Plaintiffs failed to oppose Defendants' Motion for Sanctions, but also due to Plaintiffs' willful and continual refusal to comply with their discovery obligations and this Court's Orders. As noted by this Court, Plaintiffs' engaged in a "pattern and practice . . . to disregard their discovery obligations at every point in this litigation" (Sanctions Order at ¶139), which was on file for more than three years before Defendants filed the Motion for Sanctions. Plaintiffs refused to disclose basic NRCP 16.1 damages computations for more than three years, despite numerous emails and letters from Defendants, multiple motions to compel and a Court Order demanding that Plaintiffs disclose their damages. Sanctions Order at ¶¶13, 16-24, 28-33, 39, 42-44, 48-49, 54, 59 and 68. Plaintiffs also refused to provide an expert disclosure of Daniel Gluhaich, again despite numerous letters and emails and an Order from this Court. *Id.* at ¶¶34-38, 40-41, 44-45, 50-53, 58, 60-61 and 68. This Court described Plaintiffs refusal to provide NRCP 16.1 damages disclosures and an expert disclosure of Mr. Gluhaich, coupled with their filing of the October 2017 summary judgment motions using new damages information supported by the opinions of Mr. Gluhaich, as a "strategic decision" that "prejudiced Defendants." *Id.* at ¶138.

Plaintiffs purported to explain away this misconduct in their Rule 60(b) Motion by claiming that Mr. Moquin had suffered a complete mental breakdown and that he had a personal

1 life in shambles. However, both the Rule 60(b) Motion and its supporting exhibits were
2 deliberately vague as to when Mr. Moquin's alleged condition caused the problems leading to
3 dismissal of Plaintiffs' claims. Plaintiffs described Mr. Moquin's alleged condition and
4 Plaintiffs' actions taken after they allegedly learned of Mr. Moquin's alleged condition, but
5 appeared to go out of their way to avoid specifying when any of the alleged events took place.
6 Now, Plaintiffs have attached additional exhibits to their Reply that shed some light on the
7 timing of these events.

8 Specifically, Exhibit 2 to the Reply is a text string between Mr. Willard and Mr. Moquin
9 from December 2, 2017 through December 6, 2017, where Mr. Willard was inquiring about the
10 status of Plaintiffs' filing in response to the Motion for Sanctions. Reply at Exhibit 2.
11 Obviously, Mr. Willard was aware of the initial deadline for Plaintiffs to respond to the Motion
12 for Sanctions, which was December 4, 2017 (based upon the November 15, 2017 filing date and
13 service through Eflex). Defendants then granted Plaintiffs extensions through 3:00 pm on
14 December 6, 2017 to file their oppositions. **Exhibit 2**, email exchange between Brian Moquin,
15 Anjali Webster and Brian Irvine. Mr. Willard was aware of the filing deadlines, and was aware
16 that nothing was filed on time. He continued to communicate with both Mr. Moquin and Mr.
17 O'Mara until December 25, 2017 (Reply at Exhibits 3-4), well after this Court's final filing
18 deadline of December 18, 2017. Sanctions Order at ¶95. Yet, despite both Mr. Willard and Mr.
19 O'Mara being fully-aware of the fact that no oppositions had been filed, neither Mr. Willard nor
20 Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case. *Id.* at
21 ¶98. In fact, Plaintiffs did nothing to apprise this Court of any of these issues until they filed the
22 Rule 60(b) Motion.

23 The Exhibits attached to the Reply simply do not support a finding of excusable neglect.
24 At best, the exhibits show that Plaintiffs' failure to oppose the Motion for Sanctions was not
25 excusable neglect because Plaintiffs were fully-aware that their attorneys were not filing the
26 oppositions in a timely way, yet Plaintiffs chose to do nothing about it, and instead continued to
27 rely on Mr. Moquin solely for financial reasons. *See* Rule 60(b) Motion at Exhibit 1, ¶81. As
28

1 such, this Court should reject Plaintiffs' claim of excusable neglect, as Plaintiffs chose to hire
2 Mr. Moquin and continue to allow him to represent them, even after becoming aware that he
3 was not timely filing a response to the Motion for Sanctions. *See Huckaby Props. v. NC Auto*
4 *Parts*, 130 Nev. Adv. Op. 23, 322 P.3d 429, 433 (2014) (client "voluntarily chose this attorney
5 as his representative in the action, and he cannot now avoid the consequences of the acts of
6 omissions of this freely selected agent.").

7 Most importantly, none of the Exhibits to the Rule 60(b) Motion or the Reply even
8 remotely explain Plaintiffs' willful and continual refusal to comply with their discovery
9 obligations and this Court's Orders, which were the bases for the Motion for Sanctions. And,
10 this Court admonished Plaintiffs in December 2017 that "you need to know going into these
11 oppositions, that I'm very seriously considering granting all of it . . . you know going into this
12 motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition
13 not to grant it." *See* Opposition at Exhibit 3, December 12, 2017 transcript of status conference.
14 As Plaintiffs do not provide any explanation in the exhibits to the Reply as to why this Court
15 should change its mind about the merits of the Motion for Sanctions, this Court should deny the
16 Rule 60(b) Motion.

17
18
19 ///

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21
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25 ///

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 6th day of June, 2018.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
DICKINSON WRIGHT
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Email: Jdesmond@dickinsonwright.com
Email: Brivine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

*Attorney for Defendants Berry Hinckley
Industries, and Jerry Herbst*

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCp 5(b); I am serving a true and correct copy of the attached **SUR-REPLY IN SUPPORT OF OPPOSITION TO THE WILLARD PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER &
WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Attorneys for Plaintiffs/Counterdefendants

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3287 Ruffino Lane
San Jose, California 95148

DATED this 6th day of June, 2018.

/s/ Mina Reel
An employee of DICKINSON WRIGHT PLLC

EXHIBIT LIST

| Exhibit | Description | Pages² |
|----------------|----------------------------------------------------------------------------------------|--------------------------|
| 1 | Declaration of Brian R. Irvine | 2 |
| 2 | December 6, 2017 email exchange between Brian Moquin, Anjali Webster and Brian Irvine. | 3 |

² Exhibit page count is exclusive of exhibit slip sheet.

EXHIBIT 1

EXHIBIT 1

DICKINSON WRIGHT PLLC
 JOHN P. DESMOND
 Nevada Bar No. 5618
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 Email: Awebster@dickinsonwright.com

*Attorney for Defendants
 Berry Hinckley Industries and Jerry Herbst*

**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
 IN AND FOR THE COUNTY OF WASHOE**

| | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------|
| <p>LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,</p> | <p>CASE NO. CV14-01712 DEPT. 6</p> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------|

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada
 corporation; and JERRY HERBST, an
 individual,

Defendants.

BERRY-HINCKLEY INDUSTRIES, a
 Nevada corporation; and JERRY HERBST,
 an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as
trustee of the Larry James Willard Trust Fund;
OVERLAND DEVELOPMENT
CORPORATION, a California corporation;

Counter-defendants.

DECLARATION OF BRIAN R. IRVINE IN SUPPORT OF
SUR-REPLY IN SUPPORT OF OPPOSITION TO THE WILLARD PLAINTIFFS'
RULE 60(b) MOTION FOR RELIEF

I, Brian R. Irvine, pursuant to NRS 53.045, declare and state as follows:

1. I am an attorney with the law firm of DICKINSON WRIGHT, PLLC, attorneys
for Defendants BERRY-HINCKLEY INDUSTRIES ("BHI") and JERRY HERBST
(collectively with BHI, "Defendants") in the above-captioned action.

2. I submit this Declaration in support of Defendants' Sur-Reply In Support Of
Opposition to the Willard Plaintiffs' Rule 60(B) Motion For Relief. ("Motion"). I have personal
knowledge of the matters set forth in this Declaration and, if called as a witness, could and
would competently testify thereto.

3. Attached to the Motion as **Exhibit 2** is a true and correct copy of the December
6, 2017 email exchange between Brian Moquin, Anjali Webster and Brian Irvine.

I declare under penalty of perjury under the law of the State of Nevada that the
foregoing is true and correct.

DATED this 6th day of June, 2018.

/s/ Brian R. Irvine

BRIAN R. IRVINE

EXHIBIT 2

EXHIBIT 2

From: [Brian R. Irvine](#)
To: [Brian Moquin](#); [Anjali D. Webster](#)
Cc: david@omaralaw.net; [Mina Reel](#)
Subject: RE: Willard/Wooley v. BHI
Date: Wednesday, December 6, 2017 10:19:25 AM
Attachments: [image70172b.JPG](#)
[image9d6e56.JPG](#)
[image7ac9ab.JPG](#)

Brian-

I would like to accommodate your request, but the three motions we filed are significant and the replies we will need to prepare will also require a significant amount of work. We filed the motions when we did with a specific timeline in mind that would allow us adequate time to prepare our replies and submit the motions in accordance with the Court's scheduling order. Every additional extension we provide you cuts into our time for reply even more, which is unfair to us and our clients.

We will hold off on submitting the motions until 3:00 pm today, but we plan on submitting them late this afternoon if your oppositions are not filed by 3:00 pm.

Brian

Brian R. Irvine Member

100 West Liberty Street Phone 775-343-7507
 Suite 940 Fax 844-670-6009
 Reno NV 89501-1991 Email BIrvine@dickinsonwright.com



From: Brian Moquin [<mailto:bmoquin@lawprism.com>]
Sent: Wednesday, December 06, 2017 9:51 AM
To: Anjali D. Webster
Cc: david@omaralaw.net; Brian R. Irvine; Mina Reel
Subject: Re: Willard/Wooley v. BHI

At 6:30 this morning, the app in which I was writing the oppositions crashed and on restarting it everything was gone. I've spent the past two hours trying to get it back but it is irretrievable. My clients are freaking out, as am I. Consequently I must beg for another 24 hours to recreate everything, the only viable alternative being seppuku.

Brian

On Dec 5, 2017, at 1:23 PM, Anjali D. Webster <AWebster@dickinson-wright.com> wrote:

Hi Brian,

Per our conversation, you will serve us with the oppositions to Defendants' motions by 10 am tomorrow, and you may have an open extension on the replies in support of Plaintiffs' motions for summary judgment.

Anjali D. Webster Attorney

100 West Liberty Street
Suite 940
Reno NV 89501-1991

Phone 775-343-7498

Fax 844-670-6009

Email AWebster@dickinsonwright.com

[<image9afc1c.JPG><imagebbac92.JPG>](#)
<imageb21932.JPG>

From: Brian Moquin [<mailto:bmoquin@lawprism.com>]

Sent: Monday, December 04, 2017 10:36 AM

To: Anjali D. Webster

Cc: david@omaralaw.net; Brian R. Irvine; Mina Reel

Subject: Re: Willard/Wooley v. BHI

May I have until this Thursday to file the responses and the replies to your motions? I'm experiencing major computer issues.

Brian

On Oct 30, 2017, at 12:34 PM, Anjali D. Webster <AWebster@dickinson-wright.com> wrote:

Great, thank you, Brian. I appreciate it.

Anjali D. Webster Attorney

100 West Liberty Street
Suite 940
Reno NV 89501-1991

Phone 775-343-7498

Fax 844-670-6009

Email AWebster@dickinsonwright.com

[<image3ea983.JPG><imagea5d9c1.JPG>](#)
<imageb0e13f.JPG>

From: Brian Moquin [<mailto:bmoquin@lawprism.com>]

Sent: Monday, October 30, 2017 12:33 PM

To: Anjali D. Webster

Cc: david@omaralaw.net; Brian R. Irvine; Mina Reel

Subject: Re: Willard/Wooley v. BHI

Plaintiffs agree to your request for a one-week extension to respond to their respective Motions for Summary Judgment. The responses will now be due on or before November 13, 2017.

Best,
Brian

Brian P. Moquin, Esq.
Law Offices of Brian P. Moquin
3287 Ruffino Lane
San Jose, CA 95148

408.300.0022
408.460.7787 cell
408.843.1678 fax

On Oct 30, 2017, at 11:57 AM, Anjali D. Webster <AWebster@dickinson-wright.com> wrote:

Dear Brian and David:

May we please have a one-week extension of time to respond to (1) Wooley's Motion for Summary Judgment and (2) Willard's Motion for Summary Judgment? Please let me know at your earliest convenience.

Thank you,

Anjali

Anjali D. Webster Attorney

100 West Liberty Street
Suite 940
Reno NV 89501-1991

Phone 775-343-7498

Fax 844-670-6009

Email AWebster@dickinsonwright.com

<[imageefa2a3.JPG](#)><[image663540.JPG](#)>
<[imagefcb73f.JPG](#)>

The information contained in this e-mail, including any attachments, is confidential, intended only for the named recipient(s), and may be legally privileged. If you are not the intended recipient, please delete the e-mail and any attachments, destroy any printouts that you may have made and notify us immediately by return e-mail.

Neither this transmission nor any attachment shall be deemed for any purpose to be a "signature" or "signed" under any electronic transmission acts, unless otherwise specifically stated herein. Thank you.

The information contained in this e-mail, including any attachments, is confidential, intended only for the named recipient(s), and may be legally privileged. If you are not the intended recipient, please delete the e-mail and any attachments, destroy any printouts that you may have made and notify us immediately by return e-mail.

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